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NORTH CAROLINA REPORTS.

VOL. 72.

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IN THE

SUPREME COURT

OF

NORTH CAROLINA.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

JANUARY TERM, 1875.

ED. H. HICKS, exr., v. THOMAS E. SKINNER and WIFE and others.

It is well settled that one may abandon his domicile of origin, either with the design of acquiring another or with the design of acquiring no other; and then until he acquires another he is without domicile, except the domicile of actual residence.

PETITION to rehear the cause as decided at the last (June) term of this Court, 71 N. C., 539, and to vacate or modify the judgment then and therein rendered.

After argument the petition was dismissed with costs.

Haywood and *Smith & Strong,* for petitioner.
Gatling, contra.

READE, J. This case was fully and ably argued at last term, as it has been at this term, and the opinion of brother *Rodman* for the Court, and the dissenting opinion of brother *Bynum,* were exhaustive as to all the questions involved, as will clearly appear by reference thereto. Nevertheless, the amount involved, the intricacy of the ques- (2) tions, the absence of the Chief Justice at last term, and the dissent of brother *Bynum*, made it not inappropriate on the part of the plaintiff, against whom our decision was, to ask a rehearing at this term. It is, however, proper that we should repeat here what we said in *Watson v. Dodd, post,* 240, that unless we have clearly mistaken some important fact, or

overlooked some express and weighty authority, we must adhere to our decisions. We consider every case with care, and decide nothing with a venture. And notwithstanding the adverse opinion of able but anxious counsel, supported by the accommodating certificate of two amiable gentlemen whose investigation was probably superficial, that our decision "is plainly erroneous," it must be taken as conclusive, unless error appears plainly to *us*. We have again carefully considered the case, and we adhere to our decision as announced in the elaborate and learned opinion of brother *Rodman*. And in this we now have the concurrence of the Chief Justice. It is from no disrespect to the able arguments with which we were favored that we do not again elaborate our views, but because we cannot add to the force of what has been already said. I will, however, avail myself of the occasion to say that I think too much was yielded to the plaintiff's case when it was admitted that the husband's domicile at the time of the marriage was North Carolina. His domicile of origin was Perquimans County, North Carolina, and thence it is inferred that his domicile continued until he acquired a new domicile. And doubtless that is the rule; but it is subject to exceptions, else one would not *abandon* one domicile until he had acquired another. Whereas, it is well settled that one may abandon his domicile of origin, either with the design of acquiring another or with the design of acquiring no other; and then until he acquires another, he is without domicile, except the domicile of actual residence. Wharton on the Conflict of Laws, sec. 78, has this head: "When a person may be without a domicile." "This, according to Savigny, may occur in the following instances: When a prior domicile has been abandoned, and a new one
(3) is sought, but not yet determined on; when the business of life is traveling, *e. g.*, agencies, etc., there being no home as a central point of interest." Then the only course is to assume residence to be domicile. And this, as it seems to me, is the case of Thomas Skinner. He abandoned or left his domicile of origin in Perquimans County, North Carolina, with no declared purpose to return, and he never did return. That turned out to be, and it does not appear that it was not intended to be, a voluntary abandonment of his domicile. He went to New York, and was resident there three years, studying for the ministry, and without any decla-

ration of domicile. And there he married, and executed the *ante*-nuptial contract, and had it perfected by registration there, according to the law of New York, *as if* it were to be performed *there;* and did not have it registered in North Carolina, *as if* it were to be performed *here.* Now what can be inferred from this other than that he had abandoned his domicile in North Carolina and had accepted New York as his domicile—at least his domicile of residence, until some other was determined on: to be influenced, no doubt, by what might be opened to him for the discharge of his ministerial duties, which have the world for their field? This seems to be precisely the case put by Wharton of a person without domicile, unless New York was his domicile. And this seems to have been confirmed by subsequent events; for he fixed not his domicile in New York, nor yet in North Carolina, but followed the first call to his duty, and fixed his domicile in Virginia. This seems to me to be so clearly the right view that probably it would have been adopted but for what was supposed to be the finding of Mr. Davis, the referee. He finds that Thomas Skinner left North Carolina, resided in New York three years, and married, but not with intent to remain. These are facts which we are not at liberty to dispute; and then he adds, "and he did not acquire a domicile in that State." This is not only fact, but law as well, and we are at liberty to question it. If he had abandoned his domicile in North Carolina, as it seems he had, with the view of fixing his domicile wherever his duty might call him, (4) he was without domicile until so called, except his domicile of residence, which was New York; so that the only domicile he had was New York, until his call to Virginia, and then he fixed his domicile there. And then Mr. Davis further says: "And not having such intent to remain in New York, it is found, as matter of law, that his domicile of origin prevailed and continued, and was his domicile at that time." This assumes that he could not lose his domicile in North Carolina until he had acquired one elsewhere, which we have shown to be erroneous. Suppose upon leaving North Carolina he had said, "I abandon North Carolina forever"; and when he arrived in New York he had said, "I have abandoned North Carolina forever, but still I do not intend to live in New York; I shall remain only until called to preach, and

then I shall go where called." Would his domicile be North Carolina until he should be called? Unquestionably not. He would be without domicile (Wharton) except the domicile of residence, New York. If this be so, then the *ante*-nuptial contract, registered in New York, was perfect there. And the rights which it secured to Mrs. Skinner followed her everywhere. When her husband brought her to North Carolina, they followed her here. And then whatever she did or failed to do in North Carolina, of which the plaintiff complains, was protected by her disability of coverture. What if she had sold and conveyed by deed (without privy examination) her property and received a full price for the same, and used the money: the conveyance would have been absolutely of no effect, and surely there can be nothing more conclusive against her than that. I am inclined to think that her coverture would have protected her against omission to register the *ante*-nuptial contract in North Carolina, even if this had been the place of its contemplated performance. But this is more than I had intended to say, and more than I have authority from the Court to say. And the case stands upon our decision at last term. Plaintiff will pay costs.

PER CURIAM. Petition dismissed.

Cited: S. v. Ross, 76 N. C., 244; *Haywood v. Daves,* 81 N. C., 9; *Ashe v. Gray,* 90 N. C., 138; *Dupree v. Ins. Co.,* 93 N. C., 239; *Hannon v. Grizzard,* 99 N. C., 162; *Fry v. Currie,* 103 N. C., 206; *Herndon v. Ins. Co.,* 110 N. C., 388.

(5)

H. P. C. WILSON, trustee, etc., v. D. A. JENKINS, Public Treasurer, and JOHN REILLY, Auditor, etc.

1. The General Assembly has absolute control over the finances of the State: the Public Treasurer and Auditor being mere ministerial officers, bound to obey the orders of the General Assembly:

2. *Hence*, the courts have now no power to compel by *mandamus* the Public Treasurer to pay a debt which the General Assembly has directed him not to pay, nor the Auditor to give a warrant upon the Treasurer which the General Assembly has directed him not to give, unless the act of the General Assembly be void as violating the Constitution of the United States or of this State.

3. The Act of 23 November,* 1874, repealing the Act of 19 August, 1868, providing for the payment of the public debt, does not impair the obligation of contracts; and under its provisions the Public Treasurer was justified in refusing to pay the coupons of bonds issued before the war, although payment thereof had been demanded and action brought, which was pending when the said act passed.

(*Dixon v. Pace*, 63 N. C., 603, cited and approved).

CIVIL ACTION, for a *mandamus* to compel the Auditor of the State to audit and the Public Treasurer to pay certain coupons, heard before *Henry, J.*, at Fall Term, 1874, of WAKE.

The material facts of this case are stated in the opinion of the Chief Justice.

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*NOTE.—The following is the Act of 23 November, 1874:

SECTION 1. *The General Assembly of North Carolina do enact:* That an act entitled "An act to provide for the payment of the interest of the lawful debt of the State," ratified 19 August, 1868, be and the same is hereby repealed.

SEC. 2. That the Treasurer shall not pay or discharge any claim for interest upon any portion of the bonded debt of this State, except as hereinafter provided for by law.

SEC. 3. That the Auditor shall not audit, or recognize, any claim for principal or interest upon any portion of the bonded debt of this State heretofore made or pretended to be made by authority of this State, except as hereafter provided for by law.

SEC. 4. That any money now in, or which may be paid into the Treasury, on account of special taxes, heretofore levied for the payment of the interest on bonds or pretended bonds of this State, is hereby transferred and appropriated to the "general fund."

SEC. 5. That this act shall take effect from its ratification.

Ratified this 23 November, 1874.

On the trial below his Honor gave judgment for the
(6) defendant. From this judgment the plaintiff appealed.

J. W. Graham, for appellant.
Attorney-General Hargrove and *Smith & Strong, contra.*

PEARSON, C. J. Our labor in deciding this case is much lightened by the discussion and opinion in *Shaffer v. Jenkins, post,* 275.

The General Assembly has absolute control over the finances of the State. The Public Treasurer and Auditor are mere ministerial officers, bound to obey the orders of the General Assembly.

It follows that the courts have no power to compel, by *mandamus,* the Public Treasurer to pay a debt which the General Assembly has directed him not to pay, or the Auditor to give a warrant upon the Treasurer which the General Assembly has directed him not to give, unless the act of the General Assembly be void as violating the Constitution of the United States or of this State.

Our case presents these facts, briefly set out: The Constitution of 1868 orders the General Assembly to provide for the prompt payment of the interest on the public debt. Carrying out this order, the General Assembly in 1868 directed the Public Treasurer to pay the interest on the lawful debt of the State out of any money not otherwise appropriated. The amendment to the Constitution in 1874 repeals this provision of the Constitution. Carrying out this amendment, the General Assembly, in November, 1874, repeals the Act of 1868, and enacts that the Public Treasurer shall not pay the interest of the bonded debt of the State except as may be hereafter provided for, and that the Auditor shall not audit or recognize any claim for interest on the debt of the State; thus following the notions of the people in adopting the Constitution of 1868 and the amendment in 1874. In March, 1874,
(7) the plaintiff held a large amount of the coupons on bonds of the State, and demanded payment of the Public Treasurer, who refused to pay, on the ground that he had no funds not otherwise appropriated; on the further

ground that should such funds be in hand he would not be at liberty to pay all of the funds to the plaintiff and leave the other creditors wholly unpaid, but would divide the fund *pro rata;* and on the further ground that the claims of the plaintiff had not been passed on by the Auditor.

The plaintiff then demanded of the Auditor that he should pass upon his debt and give him a warrant upon the Public Treasurer. To this demand the Auditor replied he had no right to interfere, whereupon the plaintiff again demanded payment of the Public Treasurer, stating that he was advised that as his debt was liquidated and was evidenced by a plain obligation to pay a specific sum, there was no occasion for a warrant of the Auditor. The Public Treasurer again failed to pay, and this action was commenced. To avoid confusion we will, for the present, put the fact that the plaintiff's action was pending at the date of the passage of the act, November, 1874, aside, and consider the legal effect of the Act of 1868, directing the Public Treasurer to pay the interest, and the Act of 1874, directing the Public Treasurer not to pay such interest and the Auditor not to give his warrant for the payment of the same.

It was said on the argument, the Act of 1874 impairs the obligation of the contract. What contract? The original contract, evidenced by the State bonds and coupons, remains intact, and is not at all impaired; the terms are not changed and the remedy existing at the execution of the bonds and coupons are now precisely the same. The Act of 1868, directing the Treasurer to apply any moneys remaining in hand, not otherwise appropriated, to discharge interest upon the lawful debt of the State, makes no new contract, nor does it add to the original contract—it is in no sense of the word a contract; it is an *ex-parte* action of the General Assembly, for which the public creditors paid no consideration and in which they took no part. It is simply an order of the Gen- (8) eral Assembly, given to its ministerial officer, which it had a right to countermand at any time before it was executed. *Dixon v. Pace,* 63 N. C., 603, is in point. One Evans owed Dixon $250; Evans sent to Pace, his agent, $250, with directions to pay it to Dixon; Pace saw proper to apply it to other debts, and his action was ratified by Evans. It is held that Evans had a right to countermand his order at any time

before Pace had paid it over to Dixon, for Dixon had done nothing to vest in him a right of action for the money against Pace, and his condition was not changed; he had paid no consideration, and must depend on the contract with Evans.

In *Charles River Bridge Co. v. Warren Bridge,* 11 Peters, 581, *Justice McLean* says: "After a careful examination of the question adjudged by this Court, they seem not to have decided in any case that the contract is impaired, within the meaning of the Constitution, *when* the *action* of the *State has not* been on the *contract.*" Here the action was not on the contract, but was collateral, and was merely the expression of the volition of the General Assembly in respect thereto, which, as we have seen, could be changed to conform to the varying will of the people, as expressed by the amendment to the Constitution, at any time before such volition had been carried into effect.

Had the plaintiff received the money he would have acquired a vested right beyond the reach of any amendment to the Constitution and of the Act of 1874; for if the General Assembly had afterwards passed an act requiring him to pay back the money and making his failure to do so a misdemeanor, the statute would have been void as *ex post facto.* But it is said the plaintiff would have got the money but for the wrongful refusal of the executive officer to obey the Act of 1868. That may be so, but still he did not get the money, and a "miss is as good as a mile."

We come now to consider how far the fact that he had made a demand upon the Treasurer and Auditor and had
(9) commenced an action, which was pending and actually being tried at the time the Act of November, 1874, was passed, can affect the question. We are not able to see any principle upon which that circumstance can make a difference. He acquired no right of property, nor did he ever acquire a lien by the pending of his action to any money in the Treasury. He had not changed his condition as a creditor of the State or surrendered any right, and still has his contract with the State and his remedy unimpaired just as it was when the contract was entered into. All that he can complain of is that the people have seen proper to amend the Constitution, and in accordance thereto the General Assembly has re-

pealed the Act of 1868, under which he had hoped to have his coupons satisfied.

Mr. Graham also took the position that, assuming the Act of 1874 not to be unconstitutional, and that it repealed the Act of 1868, under which this action was brought, the repeal did not affect his case by reason of the provision in ch. 108, sec. 1, Battle's Revisal: "The repeal of a statute shall not affect any suit brought before the repeal, for any forfeiture incurred or for the recovery of *any rights accruing under such statute.*" What right accrued to the plaintiff under the Act of 1868? None based on contract, as we have seen; at most a mere expectation that his money would be paid under an act which the General Assembly had passed in obedience to the Constitution and as an act of justice; but the people had power to amend the Constitution, and the General Assembly had power to repeal the act in accordance with the amendments; so the plaintiff had acquired no legal right under the Act of 1868, within the meaning of the statute referred to. If he had, the repealing Act of 1874, being directly called for by the amendment of the Constitution, would override a general provision of the kind. A complete answer to the position, however, is that the Act of 1874 not only repeals the Act of 1868, but in secs. 2 and 3, in so many words, forbids the Treasurer from paying and the Auditor from recognizing, any claim for principal or interest of the bonded debt of the State except as may be hereafter provided for by (10) law. There is no error.

PER CURIAM. Judgment affirmed.

THE WILMINGTON, COLUMBIA AND AUGUSTA RAILROAD CO. v. THE BOARD OF COMMISSIONERS OF BRUNSWICK COUNTY.

1. The right to value the tangible real and personal property of a railroad corporation, as distinguished from its franchise, is vested by the Constitution in the Township Board of Trustees.

2. Such franchise is capable of valuation, apart from the property which the corporation may happen to own; and a valuation of the franchise does not necessarily or properly include a valuation of the corporate property.

3. The payment of a tax upon the franchise of a corporation valued improperly and upon erroneous principles, is no defense against a tax legally levied by the county authorities under the general law.

PETITION for relief from certain taxes, presented to defendants, and heard upon appeal by his Honor, *Judge Russell,* at chambers, in BRUNSWICK, 19 May, 1874.

The plaintiff filed the following petition:

STATE OF NORTH CAROLINA—County of Brunswick.

To the Board of Commissioners of Brunswick County:

The Wilmington, Columbia and Augusta Railroad Company, a corporation duly created and existing by and under the laws of the State aforesaid, respectfully complains:

That the property of the said corporation has been improperly valued, and that it is charged with an excessive
(11) tax. That the franchise of the said corporation has been duly given in and duly assessed for taxation for the current year, according to the provision of the 10th section of the act ratified 28 February, A. D. 1873, and entitled "An act to provide for the collection of taxes by the State, and the several counties of the State, on property, polls and income" (known as the "Machinery Act"); and the tax thereon has been paid. And notwithstanding the same, your board has laid and assessed a large additional State and county tax on the road-bed, superstructure and land of this complainant, placing on them all a lumping tax of $....., which this complainant is advised is illegal.

Wherefore this complainant prays that the said last-mentioned tax on its road-bed, superstructure and land be altogether remitted and set aside.

Upon the hearing of the foregoing petition, the Board of Commissioners found as a fact that the tax upon the franchise of the said railroad, the plaintiff, had been paid; that the tax complained of is upon 35 35-100 miles of road-bed, superstructure and lands in Brunswick County, which were not listed for taxation by the complainant, being a separate and independent tax from that levied upon the franchise; it being considered by the board that the two classes of property are entirely distinct in their character, and each equally subject to taxation. The board further found that the property was properly valued, etc.

The board refused to grant the prayer of the petition and ordered the company to pay cost, etc. From this order the company appealed.

His Honor reversed the order made by the board, and the Commissioners appealed to this Court.

M. and *A. T. & J. London,* for appellants.
Strange and *Smith & Strong, contra.*

RODMAN, J. By the Constitution, Art. V, sec. 3, (12) all the real and personal property in the State is required to be taxed uniformly according to its value. There are certain exceptions not material for the present purpose. The township trustees are required to assess the value of the taxable property in their respective townships, subject to the revision of the County Commissioners. Art. VII, sec. 6. Under these clauses of the Constitution, and under acts of the Legislature made for carrying them into effect, the Commissioners of Brunswick County have valued the land of the Wilmington, Columbia, etc., Railroad Company, over which the railroad passes, together with the superstructure of wooden cross-ties, rails, station-houses, etc., at $315,000, and have levied upon it a State and county tax upon that valuation. The part of the road which lies in the county of Brunswick is a little over thirty-five miles in length, and it appears that the company owns sixty feet on each side of the central line of the road, giving an area of about five hundred acres.

The General Assembly is also authorized by the Constitution, Art. V, sec. 3, to tax franchises and incomes, provided that no income shall be taxed when the property from which

the income is derived is taxed. Under this clause the General Assembly enacted (Act 1872-'73, ch. 115, sec. 10) that the value of the franchise and rolling-stock of every railroad corporation should be given in to the Treasurer of the State and should be valued by him and by the Governor and Auditor, and a tax levied thereon according to its value, uniform with the tax on other property, and that the tax upon the franchise and rolling-stock collected in each county should be in proportion to the length of the road in such county. In supposed conformity with this law, the company gave in to the Treasurer all their real and personal property in the State, including the road-bed and superstructure, which the Governor and his associates apparently valued at $150,000 (something less than half), lying and being taxable in Brunswick County. The State and county taxes on this valuation were duly paid. It does not distinctly appear from
(13) anything that we have before us that the road-bed and superstructure were actually included in this valuation. We assume, however, as appears probable, that all the property of the company was included in the valuation of its franchise.

It is contended for the company that the payment of the tax thus assessed exempted it from all other taxation; and it must be admitted that it could never have been the intention of the General Assembly to tax the property of the company twice, viz., once in the way of real and personal property, under the general law, and once as a constituent part of its franchise, under the special act referred to. It may be, and we are of the opinion, that the Governor and his associates exceeded their powers under the Constitution in valuing anything but the franchise of the company, if they did value anything more; and if they valued the franchise alone, their valuation evidently proceeded upon an erroneous principle. As the Constitution *authorizes*, although it does not *require*, the General Assembly to tax franchises and provides no way in which the franchise may be valued, the Assembly may tax the franchise, and provide for its valuation, in any way that it thinks proper. There can be no question that it may tax it upon the valuation of a board consisting of the Governor and other associates. But we conceive that the Assembly has no right to confer on such board the power of valuing the tangible real

and personal property of a railroad company. Such power is by the Constitution vested in the township trustees alone, and cannot be taken away from them. However difficult it may be practically to value the franchise of a railroad company separate from the property which it uses in the enjoyment of the franchise, it is possible to do so. The franchise has a value independent of the property actually used for the enjoyment of it. Every franchise to build a railroad carries with it something of a monopoly or exclusion of others. The company first chartered of course selects the most available route, and of necessity excludes all others from that particular route. The grant of a charter to run a railroad by the most available route between (14) two populous cities, such as New York and Philadelphia, would have a pecuniary value before the grantee of the charter had expended a dollar in procuring a road-bed. The patentee of a sewing-machine, or other valuable invention, has an interest of pecuniary value, independent of the ownership of any material and tangible property.

A franchise to build or run a railroad between two insignificant towns, or through a desert, would be of no value. We are not called on, and will not unnecessarily undertake to say upon what principles the franchise of a corporation should be valued. It fulfills the present purpose to say that it is capable of a valuation apart from the property which the corporation may happen to own, and a valuation of the franchise does not necessarily or properly include a valuation of the corporate property.

If the Governor and his associates have valued the franchise of the plaintiff company on an erroneous principle, and have thereby overvalued it, the company is entitled in a proper case to relief from the consequent tax. But the payment of such tax is no defense against a tax legally levied by the county authorities under the general law.

It may be, and we think it probable, that the valuation of the property of the company in the county of Brunswick is unreasonable and excessive. It does not appear to us on what principles the township or county officers proceeded, and consequently we cannot say that the valuation is wrong. If it was made to appear that they proceeded on an erroneous principle, we might perhaps correct their valuation; but an

error in the fact of the value of the property is beyond our power to correct.

We are not called on, and will not unnecessarily undertake to say, as law, upon what principle the road-bed and superstructure of a railroad should be valued. But it may be useful to suggest for the consideration of county officers some views which seem reasonable: 1. The cost of a structure, whether it be a house or a railroad, is not the test of its
(15) value for taxation. Many instances might be given to show that such a rule would be absurd. A man may build a very costly house in a place which is afterwards found out to be malarious, and it is consequently valueless for habitation. An inventor constructs a costly machine which from some fault does not work, etc.

2. Neither is the value of the ties and rails, if removed, a test. It may be doubted whether a railroad company, having accepted privileges under its charter, would have a right, upon finding its road unprofitable, to tear it up and deprive the public of its use. The true point of inquiry is, What is the value of the land and structure as it is actually used, or as it is capable of being used, without losing its character as a railroad?

PER CURIAM. Judgment reversed.

Cited: Bridge Co. v. Comrs., post, 17; *Wade v. Comrs.,* 74 N. C., 83; *R. R. v. Comrs., Id.,* 509; *R. R. v. Brogden, Id.,* 711; *R. R. v. Comrs.,* 82 N. C., 262; *Belo v. Comrs., Id.,* 417; *R. R. v. Comrs.,* 84 N. C., 513; *R. R. v. Comrs.,* 87 N. C., 134.

THE WILMINGTON RAILWAY BRIDGE CO. v. BOARD OF COMMISSIONERS OF NEW HANOVER COUNTY.

The payment of the tax upon the franchise of a railroad corporation, under the Act of 1872-'73, ch. 115, does not exempt the corporation from the payment of county and State taxes, properly levied upon its road-bed, superstructure, etc.

(*R. R. v. Commissioners, ante*, 10, cited and approved).

PETITION for relief from taxation, heard upon appeal, by *Russell, J.*, at chambers, in NEW HANOVER, 29 May, 1874.

The plaintiff, a corporation organized under an ordinance of the Convention of 1866, amended by an (16) act of the General Assembly, ratified 28 February, 1867, petitions the Board of Commissioners of New Hanover County to be relieved from certain taxes, alleging that the line of railroad held by the corporation extends from the eastern side of the northeastern branch of the Cape Fear River, across said branch and the strip of land (about two miles wide) between the same and the northwestern branch of said river, and across said last-named branch to the bluff on its southern side in the county of Brunswick; and that said bridges and line of railroad are held by the plaintiff corporation, being its only property, which is used by the Carolina Central Railway Company and the Wilmington, Columbia and Augusta Railroad Company. That these two railroads, under the law of 28 February, 1873, have listed and given in by their proper officers the value of their respective franchises in each county in the State through which the said roads run, and including the whole of the line of railroad and bridges held by the plaintiff, which has been duly assessed and the tax upon such franchises paid.

The plaintiff corporation owns no rolling-stock or property of any kind other than its franchise, in connection with the line of road and the bridges before referred to, which are in fact part of the lines of the two companies mentioned, the exclusive use thereof being vested in said companies in perpetuity, by a formal covenant and agreement entered into some years ago between the said railroad companies and the plaintiff.

The plaintiff insists that its only interest and estate in the lines of railroad and bridges referred to is the franchise or

right-of-way over the same, the value of which has been listed and assessed, and the taxes due thereon have been paid as hereinbefore stated; and that the company was not bound to give in or list the same or to pay the taxes which have been assessed thereon by the board, which assessment the plaintiff insists is unauthorized and not in accordance with the act of Assembly.

(17) The Board of Commissioners, disclaiming any right to tax the franchise of the plaintiff corporation, decided it had a right to tax the property, etc., and that the assessment was not excessive. Judgment was given against the plaintiff for costs, from which the company appealed.

Upon the hearing before his Honor he reversed the decision of the board, whereupon the Commissioners appealed to this Court.

A. T. & J. London and *M. London,* for appellants.
Strange and *Smith & Strong, contra.*

RODMAN, J. The question in this case we conceive to be substantially the same with that decided in *R. R. v. Commissioners, ante,* 10.

We do not think it was desired that we should pass on the liabilities to the payment of the tax as between the bridge company and its lessees, the railroad companies. We conceive the question intended to be presented to be whether the tax levied under a valuation of the franchise of the bridge company under the Act of 1871-'72, ch. 115, by the Governor and his associates, exempts the bridge company from taxation upon its real estate as valued by the township trustees, subject to the revision of the County Commissioners under the general law providing for the taxation of all real estate by an uniform rule. In the case cited, we have decided that the plaintiff's company is not exempt, and it is unnecessary to go over the reasoning again.

PER CURIAM. Judgment below reversed, and judgment for defendant.

Cited: Kyle v. Comrs., 75 N. C., 449; *R. R. v. Comrs.,* 82 N. C., 262; *Belo v. Comrs., Id.,* 417; *R. R. v. Comrs.,* 84 N. C., 513.

(18)

DANIEL G. McMILLAN v. W. R. LOVE.

1. Summary proceedings before a justice of the peace, under the Landlord and Tenant Act, cannot be sustained against a mortgagor, who holds over after a sale of the mortgaged premises.

2. The assignee in bankruptcy of such mortgagor is entitled to a writ of restitution, upon the dismissal of the plaintiff's proceedings.

(*McCombs v. Wallace*, 66 N. C., 481; *Greer v. Wilbar*, *post*, 592, and *Perry v. Tupper*, 70 N. C., 538, cited and approved).

SUMMARY PROCEEDINGS, in the nature of ejectment, tried before *Buxton, J.*, at Spring Term, 1874, of CUMBERLAND.

The plaintiff originally instituted proceedings under the Landlord and Tenant Act before a justice of the peace, which were brought by the appeal of the defendant to the Superior Court.

The facts as they appeared on the trial below are substantially as follows:

The defendant and wife on 4 September, 1869, executed a mortgage to one Baker, to secure the sum of $800, due six months thereafter, with a power of sale in case the payment was not made. The note not being paid by defendants at maturity, Baker sold the mortgaged premises, and the plaintiff purchased the same. On 16 May, 1870, Baker made a deed to plaintiff for the premises, then in possession of defendant.

On 7 December, 1870, the plaintiff executed a deed to the said M. A. Baker, conveying to him a strip off of the land 230 inches wide, the same being a lot in the town of Fayetteville. Baker testified that he sold the land under the mortgage at public sale to the plaintiff for $780, which sum the plaintiff paid him. It was a *bona fide* transaction; the plaintiff paid his own money, and afterwards sold to him, Baker, the strip mentioned.

It was insisted for the defendant that he was no such tenant as came under the provisions of the Landlord and Tenant Act, and that the plaintiff could not evict him (19) under proceedings brought in a justice's court. Of this opinion was his Honor, and so instructed the jury, who returned a verdict for the defendant. The defendant then moved for a writ of restitution, as the original defendant had been removed from possession by the judgment of the justice of the peace.

This motion the plaintiff resisted on two grounds:

1. It was a matter discretionary with the Court whether to grant the writ or not, and this was not a proper case for the exercise of such discretion.

2. That the rights of W. R. Love, the original defendant, in the property had passed from him by his assignment in bankruptcy, so that he could not be restored to the possession. And as for the present defendant, D. G. McRae, the assignee, he could not be restored to the possession, for he never had it —the right of restitution being a personal right to the bankrupt.

His Honor, after argument, granted the writ in favor of McRae, the assignee, and rendered judgment against the plaintiff.

From this judgment plaintiff appealed.

B. Fuller, for appellant.
Hinsdale and *Guthrie, contra.*

PEARSON, C. J. This case does not come within the operation of the Landlord and Tenant Act. *McCombs v. Wallace,* 66 N. C., 481, and *Greer v. Wilbar, post,* 592.

The writ of restitution was a matter of course, according to the principle established by *Perry v. Tupper,* 70 N. C., 538.

The position, "there can be no restitution to Love, for all of his rights passed by the assignment in bankruptcy; and there can be no restitution to McRae, *for he never had possession,*" is a mere play upon words. McRae, as assignee, in the forcible language of the books, stands *in the shoes* of Love, that is, he takes his place, and becomes entitled to all of his rights in respect to property as distinguished
(20) from his rights in respect to his person. These are not at all interfered with by the order to put McRae in possession of the land, in regard to which this proceeding was instituted before a justice of the peace. The justice of the peace had no jurisdiction; his action was void, and the due administration of the law requires that the parties should be put in *statu quo.* No error.

PER CURIAM. Affirmed.

Cited: Riley v. Jordan, 75 N. C., 183; *Taylor v. Taylor,* 112 N. C., 31.

J. A. LONG v. A. T. COLE, E. D. COVINGTON and others.

Where a plaintiff brought an action to review and correct a decree heretofore made in an old suit in equity, and not yet performed: *Held*, upon demurrer, that the proper remedy for the plaintiff was a motion in the original suit, still pending, and not by an independent action in the nature of a bill of review.

CIVIL ACTION in the nature of a *bill of review*, heard upon complaint and demurrer, before *Buxton, J.*, Spring Term, 1874, of RICHMOND.

The present action was brought by the plaintiff, praying that a decree made in an equity suit between the same parties at Spring Term, 1871, might be reviewed, reversed and set aside. The original suit was commenced by bill in equity, at Spring Term, 1868, for the purpose of closing a partnership existing between the said parties.

In his statement of the case his Honor remarks that "so far as the parties are concerned, the decree seems to have been performed, as the partnership funds in contest are in the hands of the Clerk of the Court as receiver."

The defendants demurred to the complaint of the plaintiff, insisting:

1. That a suit between the same parties and for the same subject-matter, in which a final decree had been (21) rendered, is still pending in this Court, and that relief could have been obtained by the plaintiff, by motion, if entitled to relief.

2. That the plaintiff ought not to sustain his action, for the further reason that the action is brought upon a judgment of this Court, duly rendered, without first giving the notice required by law.

His Honor overruled the demurrer. From this judgment defendants appealed.

Cole, Leitch and *Walker*, for appellants.
Merrimon, Fuller & Ashe, and *Shaw, contra*.

READE, J. The original suit between the parties was heard at Fall Term, 1870, and there was a decree directing the Clerk to reform the account which had been reported, in certain particulars, and when so reformed it should stand as

the decree of the Court. At Spring Term, 1871, and before the decree had been performed, this action was commenced for the purpose of having the decree reviewed and corrected.

The defendants demurred for cause that the plaintiffs' remedy was by motion in the original cause then pending.

His Honor was of the opinion that "so far as the parties are concerned, the decree seems to have been performed, as the partnership funds in contest are in the hands of the Clerk of the Court as receiver." If from this we are to understand his Honor's opinion to be that the original suit was not pending, and that no motion could have been made therein, we think he was mistaken. We are also of the opinion that the plaintiff's remedy is by a motion in that suit. The effect of this decision is to reverse his Honor's ruling and sustain the demurrer. But then we are also of opinion that upon the payment of costs by the plaintiff, if the plaintiff had moved, it would have been proper for his Honor to have treated this proceeding as a motion in the original suit.

(22) The cause will be remanded, that the parties may proceed as they may be advised. The plaintiff will pay the costs of this Court, as he made no motion below to treat his action as a motion in the original suit.

PER CURIAM. Judgment accordingly.

Cited: Lynn v. Lowe, 88 N. C., 484.

STATE on the relation of JOHN P. RASCOE v. S. B. HYMAN, W. H. SHIELDS, S. B. HYMAN, exr. of JOHN H. HYMAN, and others.

Where one of two administrators takes exclusive possession of the effects of their intestate, and in his administration thereof commits a *devastavit*, his co-administrator will be responsible therefor, on their official bond, although no assets ever came into his hands.

CIVIL ACTION, on the bond of an administrator, tried at the Special (December) Term, 1874, of HALIFAX, before *Henry, J.,* upon complaint and demurrer.

In his complaint the plaintiff alleges that in 1860 one A. M. Riddick died intestate, and at February Term, 1861, of the

Court of Pleas and Quarter Sessions of Halifax County the defendant S. B. Hyman, and John H. Hyman, deceased, and the testator of the said S. B. Hyman, duly qualified as his administrators, entering into bond with the defendant Shields and others as sureties. That the intestate Riddick in 1851 executed a bond payable to the plaintiff, with sureties, in the sum of $832.43, with interest, which interest has been paid up to 1861.

John H. Hyman died in 1868, leaving a will, and the defendant S. B. Hyman qualified as his executor.

At Fall Term, 1869, the plaintiff sued S. B. Hyman as surviving administrator of the said A. M. Riddick for the recovery of the balance due on the said bond; and S. B. Hyman, the defendant in that suit, alleged in his defense that his co-administrator, John H. Hyman, his testator (23) also, immediately after their qualification as administrators upon the said Riddick's estate, "took exclusive possession of the effects of their intestate, and had the sole management thereof until his death in July, 1868; and that he has not had at the time of the commencement of this action, or at any time since, or ever had in his possession, any goods or chattels which were of said A. M. Riddick at the time of his death to be administered." At Spring Term, 1871, the plaintiff recovered judgment *quando* against the said surviving administrator on his bond for $1,341.87, with interest, etc.

The plaintiff further alleges in his complaint that the defense set up by S. B. Hyman in that first suit was true, and that a large sum of money came into the hands of John H. Hyman, as one of the administrators of the said A. M. Riddick, of which the sum of $6,000 he never disbursed, but converted to his own use. Wherefore he demands judgment, etc.

The defendants demurred upon the ground:

That the complaint does not state facts sufficient to constitute a cause of action. In this,

1. That the relator of the plaintiff did not have leave of the Judge of the Court to bring his action.

2. The relator is estopped by his judgment of assets *quando* from recovering any assets which were received by John H. Hyman.

3. That since plea pleaded, and the recovery of judgment in the first suit, it does not appear that the defendant S. B.

Hyman has received any assets of his intestate to be administered.

4. The defendant S. B. Hyman is not fixed with any assets of his intestate which have come to his hands to be administered since plea pleaded and the rendition of said judgment.

On the hearing, his Honor sustained the demurrer
(24) and dismissed the action. From this judgment plaintiff appealed.

Walter Clark, for appellant.
Hill, contra.

SETTLE, J. Admitting that the defendant S. B. Hyman cannot be held responsible in his character as surviving administrator of A. M. Riddick for the reason that no assets of the intestate came to his hands; and further, that he cannot be held responsible in his character of executor of his co-administrator John H. Hyman, for the reason that no assets of the intestate were in the hands of J. H. Hyman at the time of his death, he having wasted the same, yet there is no reason why he should not be held responsible as an obligor on the administration bond for the *devastavit* committed by J. H. Hyman, just as any other obligor on that bond would be responsible. The breach of the bond complained of in this action is the *devastavit* committed by J. H. Hyman. Why are not all the obligors on the bond responsible for the breach? The plaintiff is not precluded from suing S. B. Hyman on the bond by the fact that in a former suit against him as surviving administrator of Riddick he had taken a judgment *quando.* This judgment admits that no assets of Riddick had come to the hands of S. B. Hyman at that time, but it does not admit that none had come to the hands of John H. Hyman, and therefore in the first action a judgment *quando* was the only one that could have been properly rendered. The demurrer should have been overruled.

PER CURIAM. Judgment reversed.

(25)

STATE v. HANSON T. HUGHES and others.

On the trial of an indictment for riot, etc., the jury found as a special verdict, "that the defendants and others assembled in the town of Oxford to celebrate the Emancipation Proclamation, and with two drums and fifes, marched up and down the streets for two or three hours. Some were mounted, but being told to dismount, they got down and hitched their horses. When told by the Mayor to desist, they at first refused, but being notified by the constable to stop, the defendant Hughes, with the procession, beating the drum, went to the Mayor's office to make up a case to be tried before a magistrate, to test the Mayor's right to forbid the procession. There were no arms in the crowd except sabers used by the officers; no violence in word or deed was offered to any citizen; some of the citizens were disturbed by the noise of the drums and some of the persons were drinking; the streets were obstructed from time to time during the interval, and one horse hitched in a lot broke loose": *Held*,

(1) That this was not an unlawful assembly, and that an unlawful assembly was a necessary element of a riot.

(2) Beating the drum and blowing the fife do not *per se* constitute a nuisance; and to make them such, the exceptional facts and circumstances which make acts, otherwise innocent, a crime, must be set forth particularly, so that the Court can see that from their very nature, if proved, they are a nuisance to the whole community.

(3) If the procession was lawful, and the streets were obstructed no more than is ordinarily the case under such circumstances, the obstruction of the streets is not an indictable offense.

(*State v. Baldwin*, 18 N. C., 195; *State v. Stalcup*, 23 N. C., 30, cited and approved).

INDICTMENT for a riot, etc., tried before *Henry, J.*, Fall Term, 1874, of GRANVILLE.

The indictment contained three counts, which, with the special verdict and all other facts necessary to an understanding of the decision of this Court, will be found in the opinion of *Justice Bynum*.

Upon the facts as found by the jury, his Honor, on the trial below, ordered a verdict of "Not guilty" to be entered for the defendants. (26)

From this judgment, Solicitor Harris for the State appealed.

Attorney-General Hargrove and *Venable*, for the State.

Young, for defendants.

BYNUM, J. The indictment contains three counts, to-wit: The first is for a riot; the second for a common nuisance by the beating of drums and the blowing of fifes and shouting in the town of Oxford; and the third count is for obstructing the streets of that town. The case is here on appeal by the State from the judgment of the Superior Court on a special verdict. The facts found by the jury are these: "That the defendants and others assembled in the town of Oxford to celebrate the Emancipation Proclamation, and with two drums and fifes marched up and down the streets for two or three hours. Some were mounted, but being told to dismount, they got down and hitched their horses. When told by the Mayor to desist, they at first refused, but being notified by the constable to stop, the defendant Hughes, with the procession, beating the drum, went to the Mayor's office to make up a case to be tried before a magistrate to test the Mayor's right to forbid the procession. There were no arms in the crowd except sabers used by the officers; no violence in word or deed was offered to any citizen. Some of the citizens were disturbed by the noise of the drums, and some of the persons were drinking. The streets were obstructed from time to time during the interval, and one horse hitched in a lot broke loose."

1. First as to the count for a riot: This was not an unlawful assembly. But an unlawful assembly is a constituent and necessary part of the offense of *riot*, and must precede the unlawful acts which complete the offense. A riot is defined to be a tumultuous disturbance of the peace by three or more persons assembling together of their own head, with intent mutually to assist each other against all who shall oppose them, and afterwards putting the design into execu-
(27) tion in a terrific and violent manner. 1 Hawk., ch. 65, secs. 4, 5, 8; 3 Inst., 176. The indictment for riot always avers that the defendants unlawfully assembled, and this averment must be proved on the trial, as well as the subsequent riotous acts of the defendants. The defendants here cannot be convicted of a riot, because the verdict finds facts from which the Court can see that the assembly was not unlawful, and because no violence in word or act was done or offered, and because the defendants, so far from defying the law when their rights were questioned, proceeded to test them

by the peaceable means of the courts. *State v. Baldwin,* 18 N. C., 165; *State v. Stalcup,* 23 N. C., 30.

2. The next count is for beating the drum, blowing the fife and loud noises, creating a nuisance thereby. Beating the drum and blowing the fife do not *per se* constitute a nuisance. The verdict finds that *some* of the citizens were disturbed by the noise of the drums. What number were disturbed, or how they were disturbed by these martial sounds, is not stated, nor is it, on the other hand, found how many were not so affected. Doubtless the younger and larger portion of that community were not "disturbed" in the sense of injury or suffering, and from the nature of music in general we must assume that the sound of drum and fife had an exceptional effect upon the few who were disturbed, as it did upon one horse that "broke loose." To render an act indictable as a nuisance it is not sufficient that it should annoy particular persons only, but it must be so inconvenient and troublesome as to annoy the whole community. *State v. Baldwin,* 18 N. C., 197. To beat a drum is not a nuisance, to blow a fife is not, neither is a procession through the streets, with these accompaniments, a crime. To constitute them such, the exceptional facts and circumstances which make acts, otherwise innocent, a crime, must be set forth particularly, so that the Court can see that from their very nature, if proved, they are a nuisance to the whole community.

3. The last count is for obstructing the public streets of the town. If the procession was lawful, and the obstruction such only as is usually incident to such assem- (28) blies, then the obstruction was not an indictable offense. Were the streets so blocked up as to hinder or prevent travel or business? Were they obstructed longer than the occasion called for? Was it accidental or done on purpose, and with a criminal intent? Upon these ingredients of crime the finding of the jury is silent and wholly lacking in that certainty and precision which are necessary to enable the Court to see certainly that an indictable offense has been committed.

In a popular government like ours, the laws allow great latitude to public demonstrations, whether political, social or moral, and it requires but little reflection to foresee that if such acts as are here found by the jury are to be construed to

be indictable, that the doctrine of riots and common nuisances would be extended far beyond the limits heretofore circumscribing them, and would put an end to all public celebrations, however innocent or commendable the purpose. No error.

PER CURIAM. Affirmed.

ADDIE W. McAFEE v. ALLEN BETTIS.

1. The acceptance of a homestead laid off in the lifetime of her husband, by a widow, is no bar to her right of dower in the other lands of her husband outside of such homestead.

2. PEARSON, C. J.: We are inclined to the opinion that a wife has no power to bind herself by a covenant of warranty in a deed which she executes only for the purpose of relinquishing her claim to the homestead, and her contingent right of dower in the land covered by the homestead.

(*Watts v. Leggett*, 66 N. C., 197, cited and distinguished from this).

PETITION FOR DOWER, heard by *Logan, J.*, at chambers, in CLEVELAND, upon an appeal from the Probate Court of said county, 1 June, 1874.

(29) From the case agreed the following facts pertinent to the points raised for decision in this Court appear:

The petitioner was married to L. M. McAfee of Cleveland County in February, 1869, and continued under coverture until his death in September, 1873. During the coverture the husband was seized in fee of 940 acres of land, save and except so much thereof as had theretofore been allotted as dower to his mother.

The defendant is in possession of said land, claiming title thereto under a sheriff's deed of date 8 April, 1872, and conveying the 940 acres above mentioned, and also under a deed from the said L. M. McAfee and wife, Addie W., the petitioner, dated 11 April, 1872, for 142 acres, being the homestead of the said husband and wife theretofore allotted to them according to law. As a counter-claim to the petitioner's right to dower, the defendant claims $.... damages for a breach of warranty in this latter deed, and prays that judgment may be rendered for the same and declared a lien on plaintiff's right.

The plaintiff demurred to the answer of the defendant, insisting: 1. That the Sheriff's deed passed the land to Bettis, subject to her right of dower. 2. That in the homestead conveyed to him by her and her husband she claimed no dower.

The Judge of Probate overruled the demurrer and adjudged against the plaintiff, dismissing her petition with costs, whereupon she appealed to the Judge of the Ninth Judicial District. His Honor overruled the decision of the Judge of Probate, and ordered the writ of dower to issue to plaintiff as prayed. From this judgment defendant appealed.

Smith & Strong, for appellant.
Fowle and *Hoke,* for petitioner.

Pearson, C. J. The plaintiff claims dower in a tract of land containing about 940 acres, exclusive of the part assigned to the mother of her husband for dower, and exclusive of 142 acres which had been assigned to her (30) husband as a homestead. In 1872 the plaintiff joined with her husband in a deed to the defendant for this 142 acres, their homestead. In 1874 the Sheriff, after a sale under execution, made a deed to the defendant for the 940 acres.

The question presented by the case is this: Is the plaintiff, who joined with her husband in a conveyance of the homestead, entitled to dower in the land outside of the homestead and outside of the dower of her husband's mother?

Suppose a man dies, leaving a widow and owning no land except his homestead. The widow has two concurrent rights: her right to the homestead under the Act of 1868-'69 and her right to dower—the one being a third is merged in the other, which includes the whole, on the principle "the greater includes the less." Suppose, after having his homestead laid off, he had purchased another tract of land: the widow clearly would be entitled to the homestead and also to dower in the after-purchased land. Why not? Her husband was seized of it during coverture, and there is no statute providing that if a widow takes the homestead she shall not also take dower in the lands which her husband may afterwards acquire by purchase or descent.

Suppose at the time of having his homestead laid off the husband owns other land: why should not the widow, at his death, take the homestead, and also be entitled to dower in the land outside of the homestead? There is no statute providing that the acceptance of the homestead by the widow shall be a bar to her right of dower in the other lands of her husband. In our case we treat the conveyance of the homestead by the husband and wife as having the same legal effect as if she had taken possession of the homestead and then claimed dower in the land not included by it.

Watts v. Leggett, 66 N. C., 197, was relied on to prove that the plaintiff having, in legal effect, accepted and enjoyed the homestead by joining her husband in selling it, cannot also have dower. That case was the converse of the
(31) case under consideration, and is plainly distinguishable. *In that,* the homestead was not laid off in the lifetime of the husband, and the widow, in the first instance, had dower assigned in the whole, including "the dwelling-house," etc., and then claimed to have the homestead laid off outside of the part assigned for dower. It is held she is not entitled to have dower assigned in the whole and then to have a homestead so laid off as not to interfere with the dower, for the reason that this would put her in a better situation than she would have been in had the homestead been laid off in the lifetime of her husband.

In this, the homestead was laid off in the lifetime of the husband and the widow submits to the loss of dower in the 142 acres covered by the homestead, and claims dower only in the tract outside of the homestead. So she does not ask "to be put in a better situation than she would have been in had the homestead been laid off in the lifetime of her husband," but is content to forego her claim of dower in the part of the land including the dwelling-house, etc., laid off for the homestead.

The counter-claim of the defendant has nothing to rest on. We are inclined to the opinion that a wife has no power to bind herself by a covenant of warranty in a deed which she executes only for the purpose of relinquishing her claim to the homestead and her contingent right of dower in the land covered by the homestead. Perhaps the more prudent course is for her, instead of executing the deed containing the cove-

nant of warranty, to execute a separate deed at the same time, and as a part of the transaction, relinquishing her right to the homestead and to dower in the land covered by it. However this may be, in our case there has been no breach of the warranty.

PER CURIAM. Affirmed.

Cited: Gregory v. Ellis, 86 N. C., 584; *Graves v. Hines,* 108 N. C., 265.

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(32)

ELIZABETH THOMPSON v. ELIJAH THOMPSON and others.

A mother, separated from her husband, is entitled to the custody of her infant child, in preference to the grandfather, into whose hands the child had been placed by the father soon after its birth.

HABEAS CORPUS, to obtain the custody of an infant child, heard by *Logan, J.,* at chambers, in POLK, 17 September, 1873.

The plaintiff, who is the mother of the child, filed her petition for a writ of *habeas corpus,* which was granted, and the defendants directed to have the child before his Honor, etc.

On the hearing, it appeared that in August, 1872, the plaintiff gave birth to an infant daughter (the child in question) and was soon after attacked with "puerperal mania," which rendered her totally delirious for several weeks, only occasionally having lucid moments. While she was in this condition her mother requested Mrs. William Thompson, the mother-in-law of the plaintiff, to take the child and take care of it, and that the mother of the plaintiff would take and nurse her.

During the sickness and delirium of the plaintiff, her husband, the defendant Elijah, accused his wife to her mother of improper conduct, and threatened to throw her "out in the road," whereupon her mother took her to her house, where she has been ever since. She has recovered her mind and health sufficient to work most of her time, though still feeble.

The defendant William Thompson, the father of Elijah, the husband, is a man of some means. Neither the father nor mother of the child has much property. The maternal grandmother of the child, with whom its mother, the plaintiff, lives, is a widow with a large family, mostly grown, and of limited means. Soon after the child was born, the father, the defendant Elijah, left and went to Georgia, where he remained nine months. He has since returned and is living with his father, the defendant William.

His Honor directed that the custody of the child should be given to the grandfather, William Thompson. From
(33) this order the plaintiff appealed.

Shipp & Bailey, for appellant.
No counsel *contra* in this Court.

READE, J. In giving the custody of the child to the paternal grandfather his Honor was influenced, no doubt, by the consideration that he was the most proper person under the circumstances; and we would affirm his action if we were permitted to do so; but the statute is express that it shall be given either to the father or the mother. Bat. Rev., ch. 54, sec. 39. There was formerly a statute which gave discretion to commit the custody to other fit person, but that has been repealed.

We declare that there is error in the order giving the custody of the child to the grandfather; and that as the case now stands the mother, the petitioner, is entitled to the custody.

The cause will be sent down to the Superior Court of Polk County that proper orders may be made. The cost will be paid by William Thompson.

There is error.

PER CURIAM. Order reversed.

(34)

WILLIAM H. SIKES v. COMMISSIONERS OF BLADEN COUNTY.

1. Where A was elected Sheriff of B County in August, 1874, and tendered to the Board of County Commissioners of said county a bond in the sum of $10,000, conditioned for the faithful execution of process, etc., which bond was accepted by said board, and then tendered two bonds of $10,000 each, justified in the amount of $13,000 each, one for the collection of the county taxes, etc., and the other for the collection of the State taxes, etc., which last two bonds were refused by the board, who also refused to qualify him as Sheriff, but appointed another person: *Held*, that A was entitled to a *mandamus* to compel the County Commissioners to receive his bonds and qualify him as Sheriff of said county.

2. Ch. 106 of Battle's Revisal differs materially from ch. 105 of the Rev. Code; and as it does not appear that that chapter in Battle's Revisal was ever regularly enacted by the General Assembly according to the provisions of the Constitution, ch. 105, sec. 13, Rev. Code, is still law.

(*State v. Cunningham*, *post*, 469, cited and approved).

MANDAMUS, heard before *McKay, J.*, at chambers, 22 October, 1874.

This was an action to compel the defendants, the Commissioners of Bladen County, to allow the plaintiff to qualify as Sheriff of said county.

The plaintiff was elected Sheriff of said county on 6 August, 1874, and tendered to the defendants the bond usually known as the "process bond," with good and sufficient sureties, justified according to law. This bond was approved by the defendants and accepted, and they then required the other bonds before he should qualify. At an adjourned meeting of the board, to which time the further consideration of the plaintiff's qualification as Sheriff was postponed, the plaintiff offered two other bonds: one conditioned for the collection, etc., of the county, school, special and poor tax, for the sum of ten thousand dollars, and justified to the full value of thirteen thousand dollars; another conditioned for the collection, etc., of the State taxes, for ten thousand dollars, and justified to the full value of thirteen thousand dollars. (35)

The plaintiff insisted that he had complied with all the requirements of the law, and that he should be allowed to qualify and enter upon the discharge of his official duties.

The defendants insisted that the two last bonds were not in accordance with the requirements of the law, not being for double the amount of State and county taxes.

The plaintiff further insisted that he, having been re-elected Sheriff, and having collected the taxes for the present year, viz., 1874, under the bond given by him in 1873, was entitled to and should be allowed to qualify as Sheriff, because the board had already approved and accepted his bond for ten thousand dollars, known as the process bond, and that the existing law did not require his bond for the collection of taxes to be more than ten thousand dollars each.

The defendants further insisted that the office of Sheriff could not be divided from that of tax collector, and thereupon declared the office of Sheriff vacant, and proceeded to appoint one William J. Sutton Sheriff, who gave bond and qualified.

The plaintiff prayed judgment:

1. That writs of *mandamus* might issue to the defendants, requiring them to allow the plaintiff to qualify as Sheriff of Bladen County upon his giving bonds justified according to law, amounting in the aggregate to thirty thousand dollars: one for the execution of process, one for the collection of county tax, and one for the collection of State tax, each conditioned for the payment of ten thousand dollars.

2. If the Court should be of the opinion that the plaintiff was not entitled to the relief above prayed, that the defendants might be required to divide the office of Sheriff from that of tax collector and allow the plaintiff to qualify as Sheriff under the bond for ten thousand dollars, accepted and approved by the defendants.

The Court refused to grant the writs, and gave judgment against the plaintiff for cost, whereupon he appealed.

(36) *W. McL. McKay* and *N. A. Steadman,* for appellant. *Thomas H. Sutton, contra.*

RODMAN, J. By the Revised Code, ch. 105, sec. 13, every Sheriff was required to execute three bonds, each in the penalty of $10,000: one conditioned for the collection and payment of the county and poor taxes; one for the collection and payment of the State taxes; and one for the proper execution of process, etc.

By the Act of 1868, ch. 1, sec. 2, it is enacted that sheriffs shall execute three several bonds, with conditions similar to those above expressed. Those conditioned for the collection of the county and poor taxes and of the State taxes shall be for twice the amount of such taxes respectively for the preceding year. And the act continues: *"Provided further, That neither of the aforesaid bonds shall exceed the amount of such bonds as required by existing law."*

This act further enacts that the penalty of the bond conditioned for the execution of process shall be $5,000.

In the compilation known as Battle's Revisal, ch. 106, sec. 8, the law is represented as being that sheriffs shall execute three several bonds, viz.: one for the collection, etc., of the county taxes; one for the collection, etc., of the State taxes, and one for the execution of process, etc.; that the penalty of the two first of said bonds shall be a sum double the amount of taxes to be secured by them respectively; and the penalty of the third bond shall be $10,000. For this law the compiler refers to the section of the Revised Code above cited. But it will be seen, on comparison, that it materially varies from that act, as it also does from the Act of 1868. We know of no acts of Assembly which either separately or in combination state the law as it is stated in Battle's Revisal. In the case of the *State v. Cunningham, post,* 469, this Court felt bound to hold, for the reasons stated in our opinion in that case, that where an act of Assembly was omitted from Battle's Revisal, it was not thereby repealed. For the same reasons, where the language of existing acts of Assembly is changed in that book, no force can be allowed to the (37) change. It does not appear that the chapter in question concerning sheriffs was ever read in the General Assembly or adopted by that body as an act in the manner prescribed by the Constitution. No certified copy of it is to be found in the office of the Secretary of State, which is the prescribed depository of all authentic legislation.

We think that when the plaintiff tendered to the defendants bonds conditioned as required by law, and in the penalty of $10,000 each, he conformed to the law, and, there being no other objection, was entitled to qualify as Sheriff.

PER CURIAM. Judgment below reversed, and judgment for plaintiff.

Modified: Dixon v. Comrs., 80 N. C., 121.

R. J. HOLMES v. JOSEPH MARSHALL.

The provision of the law which requires the certificate of probate, made by the Probate Judge of a county other than that in which the instrument is to be registered, to be passed on by the Probate Judge of the latter, is only directory, and a registration upon a probate which has not been so passed upon is valid.

(*Brooks v. Radcliff*, 33 N. C., 321; *Woodley v. Gilliam*, 66 N. C., 649; *State v. Robbins*, 28 N. C., 23; *Latham v. Bowen*, 52 N. C., 337; *Starke v. Etheridge*, 71 N. C., 240; *Jones v. Ruffin*, 14 N. C., 404, cited and approved).

ACTION for damages, tried before *Buxton, J.*, at Fall Term, 1874, STANLY.

All the facts necessary to an understanding of the case are set out in the opinion of the Court.

McCorkle and *W. J. Montgomery*, for appellant.
Bailey and *S. J. Pemberton, contra.*

(38) RODMAN, J. On 6 July, 1871, certain persons conveyed to the plaintiff certain goods, the conversion of which by the defendant is the subject of the complaint, by a deed in trust to secure certain debts owing by the grantors to the plaintiff. The grantors, at the time of making the deed, resided in Stanly County, and the goods were then in that county. The deed was proved in due form before the Probate Judge of Rowan County, who certified thereto under his official seal, and was registered by the Register of Stanly County on 5 April, 1872, on said certificate, which had not been presented to or passed on by the Probate Judge of said county of Stanly. The defendant was Sheriff of Stanly County, and by virtue of executions against the grantors in the deed seized and sold the goods, which is the conversion complained of.

The Judge before whom the case was tried held, in effect, that the deed was invalid against the creditors of the grantors, for want of an authorized registration. The question is, whether the Register of Stanly County was justified in registering the deed upon the certificate of probate and *fiat* from the Probate Judge of Rowan County, or does the law require that the deed, with the certificate of probate, should have been

presented to and passed on by the Probate Judge of Stanly County, and a *fiat* for registration made by him, before it could be lawfully registered.

The defendant admits that the deed was lawfully *proved* before the Probate Judge of Rowan, and we conceive that to be so, under the Act of 1868-'69, ch. 277, sec. 15, which expressly enacts that any instrument requiring registration "must be offered for probate before the Judge of Probate of *any* county of this State."

He contends, however, that although it was lawfully proved, yet if there was no authorized *fiat* for its registration the registration would be a nullity; and that consequently the registration is void for all purposes. The question is an important one in practice.

I. How is it affected by statute? We have made a careful examination of the numerous and somewhat obscure original acts, which are compiled together as if they (39) were but one act, in ch. 35 of Battle's Revisal.

It would be of little use to present here an abstract of those acts, with remarks on their provisions. We think that any who will repeat the process will find that the following are the results:

1. The Probate Judge of Rowan has jurisdiction to take *probate* of the deed in question. Act of 1868-'69, ch. 277, sec. 15 (Bat. Rev., ch. 35, sec. 2), amending C. C. P., sec. 429.

2. There is no act of Assembly *expressly* authorizing the Probate Judge of Rowan to make a *fiat* for the registration of a deed or other instrument in Stanly County, or expressly authorizing the Register of Stanly to register a deed, etc., on such probate.

3. There is no act which *expressly* requires a deed in trust or mortgage of personal property (as the deed here is), proved before the Probate Judge of Rowan, to be presented to and passed on by the Probate Judge of Stanly before or in order to its registration.

4. There are acts which require that when the probate of deeds, etc., of certain classes is taken before a Probate Judge other than that of the county in which the deed is required to be registered, the certificate of probate shall be presented to

and passed on by the Probate Judge of the latter county, who shall make an order on which it shall be registered.

The acts, by their terms, are confined to deeds for land, deeds from married women, and deeds proved under a commission. It might seem from sec. 22 of Battle's Revisal that they had a more extensive effect. But this section is compiled from ch. 185 of the Act of 1869-'70, which relates only to deeds of non-residents proved under a commission, and its location in a compilation cannot alter its original meaning.

II. We prefer, however, not to put our decision of this case on the narrow ground that it is perhaps the solitary exception to the general legislation for the registration of instruments.

(40) Assuming that the provision which applies, in most cases, applies to this also, the question is presented whether the provision is *imperative* or merely *directory*. Not whether it ought to be observed—for every expression of the legislative will ought to be observed—but whether its observance is so essential a part of the legislative policy that its non-observance will invalidate the registration? This legislation is so recent that there is no authority either way, and the question must be answered on general principles and a comparison of analogous cases.

The distinction between imperative statutes and those which, in whole or in part, are directory merely, has long been established and is familiar. Sedgwick Stat. and Const. Law, 368, where numerous examples are given. Probably it is impossible to frame an *universal* rule to distinguish one class of provisions from the other, and we shall not hazard the attempt. But perhaps it may be said sufficiently for the present purpose that when the act directed to be done is necessary to accomplish the apparent object of the legislation it is essential; but if the whole object can be accomplished, even if the act directed be not done, then the provision requiring it is directory merely, and it will not be permitted that the main object shall be defeated by an omission of any collateral and unessential form.

Thus if a Sheriff fails to advertise a sale under execution, as by law he is required to do, the sale is nevertheless valid. *Oxley v. Mizle,* 7 N. C., 250; *Brooks v. Radcliff,* 33 N. C.,

321; *Woodly v. Gilliam,* 66 N. C., 649. A minister or justice is forbidden to marry a couple without a license having been first procured; nevertheless the marriage if performed is not void. *State v. Robbins,* 28 N. C., 23. *Lord Mansfield* indicates this rule in *Rex v. Loxdale,* 1 Burr., 447.

The object of the registration of deeds, etc., is evidently to notify the public of their existence. (See *Latham v. Bowen,* 52 N. C., 341). If that be the sole object, why may they not be registered upon presentation to the Register by any party, without any probate at all? We conceive the reason to be this: If no probate by oath were required, it (41) would probably happen that many false and unreal deeds, etc., would be registered, and the public would have no probable ground to believe in the genuineness of any of them. The probate of a deed is always *ex-parte;* it is not conclusive; it need not be registered with the deed. *Starke v. Etheridge,* 71 N. C., 240. It may be made by an incompetent witness, and yet the registration will be valid. *Jones v. Ruffin,* 14 N. C., 404; *McKinnon v. McLean,* 19 N. C., 79; *Starke v. Etheridge, ubi supra.* The registration of a deed has no conclusive force except as a notice.

Every apparent object of the laws requiring registration can be accomplished by a registration upon a probate before any officer competent to take probate.

The law authorizes every Probate Judge in the State to take probate of any deed. It says that his certificate of probate shall be passed on by the Probate Judge of the county in which the deed is required to be registered before its registration. But it does not say that the registration shall be void unless it is so passed on. It seems to be established that, in general, an affirmative statute is merely directory. *Rex v. Birmingham,* 8 B. & C., 29-35 (E. C. L.); *Cole v. Green,* 6 Man. & Granger, 872 (46 E. C. L.); Sedgwick, 370.

No reason occurs to us why the Probate Judge of Rowan, being by statute competent to pass on the sufficiency of the probate of all deeds required to be registered in his own county, should not be equally competent to pass on the sufficiency of the probate of those to be registered in other counties.

It would seem that a power to take probate naturally carries with it, as an incident, a power to order registration. By an act of Assembly before the Revised Statutes, and which may be found in the Revised Code, ch. 37, sec. 2, Judges of the Supreme and Superior Courts were authorized to take probate of deeds. It is well known that the invariable practice was to add to the certificate of probate a *fiat* for registration, which was obeyed by the Register of any
(42) county in which the deed was offered for registration without having been passed on by the Clerk of the County Court, who was the general probate officer of the county. Many estates rest on registrations of this sort, and they were never questioned. But they could only have been valid on the idea above stated, that the power to order registration was an incident to the power to take probate. We cannot think that the Legislature intended to change this settled practice by indirection; by a simple affirmative statute directing an additional ceremony. If it had intended to make every registration void, except on the *fiat* of the Probate Judge of the county of registration, it would have said so plainly.

There are other reasons against construing this provision of the registration acts rigidly, according to their literal import. They seem to consider the probate of a deed as an adjudication of its due execution. It is almost certain that the Legislature never intended this with its consequences. If an adjudication at all, it would be *in rem,* and conclusive on all the world, which could never have been intended.

We conclude that the provision requiring the certificate of probate by the Probate Judge of a county other than that of registration to be passed on by the Probate Judge of the county of registration is *directory,* and that a registration upon a probate which has not been so passed on is not void.

PER CURIAM. *Venire de novo.*

Cited: Young v. Jackson, 92 N. C., 146; *Tatom v. White,* 95 N. C., 459; *Sellers v. Sellers,* 98 N. C., 19; *Evans v. Etheridge,* 99 N. C., 47; *Devereux v. McMahon,* 102 N. C., 289; *White v. Connelly,* 105 N. C., 68; *Darden v. Steamboat Co.,* 107 N. C., 445; *Westfelt v. Adams,* 131 N. C., 382.

(43)

WILLIAM M. SHIELDS and others by their guardian v. JOHN T. LAWRENCE, collector of MARGARET W. DAVIS.

1. Where, in an action to recover damages in the nature of waste, the defendant, a tenant for life, dies pending such action, it is not error in the Court below to allow the personal representative of such defendant to be made a party. Further, the Court may, in its discretion, allow the plaintiff to amend his complaint, and declare for actual damages.

2. No action shall abate by the death of a party if the cause of action survive or continue.

(*Butner v. Kehln*, 51 N. C., 60; *Ripley v. Miller*, 33 N. C., 247; *Collier v. Arrington*, 61 N. C., 356; *Peebles v. N. C. Railroad Co.*, 63 N. C., 238; *Shuler v. Millsaps*, 71 N. C., 297, cited and approved; and *Brown v. Blick*, 7 N. C., 511, cited and distinguished from this).

CIVIL ACTION for damages, tried before *Henry, J.*, December (Special) Term, 1874, HALIFAX.

This was an action, in the nature of an action for waste, commenced by the plaintiffs against the testator of the defendant.

It is unnecessary to state the alleged acts of waste, as they are not necessary to an understanding of the case as decided in this Court.

The action was commenced at Spring Term, 1871, and the original defendant, Margaret W. Davis, died in the month of May, 1873, and at the June Term of the Court John T. Lawrence was appointed her collector. At the Spring Term, 1873, the death of Margaret W. Davis was suggested on the record, and it was ordered that the citation issue to make her personal representative a party to the suit.

The present defendant appeared in obedience to said citation and entered the following plea, to-wit: That he insists that said action abated by the death of the defendant Margaret W. Davis, and in law cannot further be prosecuted.

The case came on to be heard, and his Honor, upon motion, allowed the plaintiffs to amend their complaint by declaring for actual damages only. The defendant (44) insisted that the Court should adjudge that the action was abated. The Court refused so to rule, and the defendant appealed.

Moore & Gatling and *Clark & Mullen,* for appellant.
T. N. Hill, Batchelor and *Conigland, contra.*

SETTLE, J. This is an action brought under the provisions of the C. C. P., sec. 383, *et seq.,* by a remainderman against the tenant for life, in which the plaintiffs demand:

1. A forfeiture of the estate of the defendant.
2. Damages for the waste committed.

During the pendency of the action the tenant for life died, and her personal representative having been brought in by citation, entered the following plea, to-wit: "He insists that the said action abated by the death of the defendant Margaret W. Davis, and in law cannot be further prosecuted."

The plaintiffs moved for and obtained leave of the Court to amend their complaint by declaring for actual damages only.

The defendant resisted this motion, contending that there was but one course open to the Court, and that was to enter a judgment that the action had abated. The Court ruled otherwise, and the defendant appealed.

We do not see that any amendment of the complaint was necessary to the maintenance of the action, but certainly the amendment which was made did not in any manner prejudice the right of the defendant.

An action for wrongs in the nature of waste is not necessarily an action "for penalties," or "for damages merely vindictive"; on the contrary, the action is generally used to recover actual and substantial damages. And that an action survives when such is its purpose, either to or against the personal representative, is too well established by the decisions of this Court to require a further discussion of the subject. *Butner v. Kehln,* 51 N. C., 60; *Ripley v. Miller,* 33 N. C., 247; *Collier v. Arrington,* 61 N. C., 356;
(45) *Peebles v. R. R.,* 63 N. C., 238; *Shuler v. Millsaps,* 71 N. C., 217.

The defendant's counsel relied upon the authority of *Brown v. Blick,* 7 N. C., 511, to show that the action of waste, being founded on a highly penal statute, did not survive. In that case the Court held that as the Acts of 1799 and 1805 enumerated certain actions which should survive and omitted to name the action of waste, it necessarily abated, under the

operation of the maxim, *expressio unius exclusio alterius.* But that decision, turning as it did upon the form of the action, can have no application to the case at bar, for the old technical action of waste is now abolished, and wrongs heretofore remediable by actions of waste are subjects of action as other wrongs. Bat. Rev., ch. 17, sec. 383, *et seq.*

And *no action* shall abate by the death of a party if the cause of action survive or continue. In case of death, except in suits for penalties and for damages merely vindictive, the Court, on motion, may allow the action to be continued by or against the personal representative of the deceased. Bat. Rev., ch. 17, sec. 64; also ch. 45, secs. 113 and 114. Our conclusion is that this action does survive as to actual damages, but not as to vindictive damages.

The judgment of the Superior Court is

PER CURIAM. Affirmed.

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(46)

R. F. SIMONTON v. A. S. BROWN and wife.

1. A deed, void at the time of its execution, cannot be made valid and effective by any amendment to the original proceedings under which such deed was executed.

2. Where land devised to a husband had, after his death, been assigned to his widow for dower in 1864, and the same had been sold under an order of Court in 1872, in a petition to sell the lands of the testator, who had devised said lands to pay his, the said testator's debt, to which petition the widow was not made a party: *Held*, that the sale was void as to her, and that no subsequent amendment by which she was made a party could make the sale valid or affect her right to dower.

ACTION to recover a certain tract of land and damages, tried at Fall Term, 1874, of ALEXANDER, being removed thereto, upon affidavit of defendants, from the Superior Court of Iredell County, before *Mitchell, J.,* upon the following facts, certified to this Court by his Honor.

One J. S. Byers died in February, 1863, leaving a last will and testament, in which he disposed of all his real and personal estate, and named his two sons, Washington and Augustus Byers, as his executors. At May Term, 1863, of the Court of Pleas, etc., of Iredell County, the said will was proved, and

Washington alone qualified as executor thereof, taking charge of the estate soon thereafter, and assenting to the several legacies therein devised and bequeathed.

Augustus Byers entered into the possession of the lands devised to him, some 1,174 acres, and in May, 1874, died intestate, leaving no children nor lineal descendants; but leaving brothers and sisters and the children of a deceased sister as his heirs at law, and the *feme* defendant in this action, his widow. At May Term, 1864, of said County Court of Iredell County, the *feme* defendant, then widow of said intestate, Augustus Byers, filed her petition for dower, and the lands, the subject of this present controversy, were regularly assigned to her by a decree of the Superior
(47) Court of said county, into which her petition had been carried. The defendant A. S. Brown, her husband, and herself having married during the pendency of her petition for dower, was made a party to that proceeding.

Washington Byers, at the time he qualified as executor, entered into bond in the penal sum of $50,000 for the faithful discharge of the duties of his office, etc., with one Kerr and A. S. Atwell as his sureties, and continued as said executor until December, 1869, when he was removed from said office by the Probate Court of Iredell County; and in 1870 one C. A. Carleton was appointed administrator *de bonis non cum testamento annexo* of said J. S. Byers' estate. Carleton, the administrator, in February, 1870, filed a petition in the Superior Court of Iredell County, praying that all the lands belonging to the estate of the said testator, J. S. Byers, including the land in controversy, should be sold for assets. In this petition the heirs at law of the said testator were made parties defendant; but the present defendants, A. S. Brown and his wife, were not made parties thereto.

The administrator obtained an order to sell a part of the lands devised in said will of J. S. Byers, including that claimed by the *feme* defendant as her dower; and it is stated in said order, by way of description, that the *feme* defendant claimed this land as her dower. On 5 August, 1872, the land was sold by the said administrator, and the plaintiff became the purchaser thereof, at the price of $2,000, which sale was duly confirmed at Fall Term, 1872, of said Court.

The plaintiff, being at the time cashier of the Bank of Statesville, paid for the land with a certified check, and the administrator made him title.

On the trial several issues were tendered by both plaintiff and defendant, most of which, relating to the sale of the land for assets, and the *devastavit* committed by Washington Byers, and the settlement of J. S. Byers' estate, are not pertinent to any point decided in this Court, and are consequently omitted from this statement. (48)

His Honor was of opinion that, as against the creditors of J. S. Byers, the *feme* defendant was not entitled to dower, and upon the facts found by the jury gave judgment for the plaintiff. The counsel for defendants moved for judgment *non obstante veredicto,* which being refused, they appealed.

Furches and *Bailey,* for appellants.
Folk & Armfield and *Scott & Caldwell, contra.*

PEARSON, C. J. The land in controversy had been assigned to the *feme* defendant for her dower as the widow of Augustus Byers. The order to sell the land was made in a proceeding to which she was not made a party. It follows that as to her the order and the sale and deed made to plaintiff in pursuance thereof were all void and of no legal effect. The question is, Did the amendment by which she was afterwards made a party, and the allegation of the insolvency of the sureties on the administration bond was added, give effect to the deed? There is no principle of law or equity by which a deed, void at the time of its execution, can be made valid and have effect by an amendment in the original proceeding. This is too plain for discussion.

After the necessary amendments were made in the proceeding, *Carleton v. Byers,* 71 N. C., 331, the proper order was to direct a resale of the land. The equity of the plaintiff to be allowed the amount paid by him as a purchaser under the first order of sale would have come on for further directions, upon the report of sale, and for distribution and application of the fund.

This is an action to recover land. Upon what principle of orderly procedure this action could be mixed up and con-

founded with a proceeding to sell land and make assets, the Court is not able to comprehend.

There is error.

PER CURIAM. Judgment reversed.

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(49)

GEORGE W. LOGAN v. JOHN H. WILKINS.

Where a plaintiff in an attachment recovered judgment against the defendant therein for the amount of his debt, and at the same term a judgment was rendered on the replevy bond of the defendant, which was subsequently stricken out: *Held*, that striking out the judgment on the replevy bond did not disturb or vacate the first judgment against the defendant in the attachment.

ATTACHMENT, tried before *Watts, J.*, at Fall Term, 1874, of HENDERSON, having been removed thereto, upon affidavit, from the county of Rutherford.

The plaintiff on 4 December, 1867, sued out of the Superior Court of Rutherford County an attachment against the defendant, which was duly levied on both real and personal property. The suit was afterwards removed to Henderson Superior Court. The defendant at a subsequent term appeared and gave a replevy bond, which, being accepted by the Court, he was allowed to plead.

At Fall Term, 1870, of Henderson Superior Court the plaintiff recovered judgment against the defendant for $2,809.65, with interest and costs; and at the same term, on motion, judgment was rendered on the replevy bond in favor of the plaintiff for $5,000, to be discharged upon the payment of the said $2,809.65, etc. From this latter judgment the sureties on the replevy bond appealed to the Supreme Court. During the same term, however, the judgment on the bond being stricken out, the appeal was not prosecuted.

On the trial in the Court below it was insisted by the defendant that the order of the Court at Fall Term, 1870, striking out the judgment against the sureties on the replevy bond had the effect of striking out the first judgment against the defendant in the attachment. His Honor was of opin-

ion that the order had no such effect. From this ruling the defendant appealed. (50)

Shipp & Bailey, for defendant.
Smith & Strong, Hargrove, J. H. Merrimon and *J. C. L. Harris, contra.*

READE, J. We agree with his Honor that the striking out the judgment against the defendants upon the replevy bond did not have the effect to disturb the judgment which had been rendered against the principal debtor, Wilkins, for the debt. And that being the only matter appealed from, the judgment must be

PER CURIAM. Affirmed.

J. L. and L. L. KITCHEN v. W. C. TROY.

Where there are no facts found, and the pleadings and affidavits are conflicting, the case will be remanded, to the end that the facts may be found by the Court below, or by a jury upon proper issues submitted to them.

ACTION and prayer for an injunction, heard before *Watts, J.,* at chambers, at the June Term, 1874, of WAKE.

After notice the defendant moved to vacate the injunction granted upon application of the plaintiffs when the summons issued. His Honor refused to vacate the injunction, and the defendant appealed.

As the case is remanded for the facts to be found, it is unnecessary at this stage of the proceedings to state the facts apparently admitted in the complaint and answer.

Fuller & Ashe, for appellant.
Jones & Jones and *Smith & Strong, contra.*

(51)

PEARSON, C. J. The facts are not found, and taking the complaint and the answer as affidavits, in connection with the other affidavits filed, there is so much conflict that this Court is not competent to decide the "questions of fact" as distinguished from "issues of fact."

The case is therefore remanded, to the end that the facts may be found by the Court, or upon issues submitted to a jury.

Mr. Ashe moved to dismiss the action on the ground that the complaint does not allege facts sufficient to entitle the plaintiffs to the relief demanded, that is, a rescission of the second mortgage. It may be that the facts alleged will not entitle the plaintiffs to have the second mortgage rescinded; but the plaintiffs allege that the second mortgage was executed with the understanding that the first mortgage and the gold watch were to be surrendered as a condition precedent. If such be the fact, the plaintiffs have an equity to enjoin a sale under the second mortgage until the defendant has purged himself of the imputed fraud and breach of faith by surrendering the first mortgage and watch, and paying by way of compensation the damages suffered by the plaintiffs by reason of not being able to dispose of the land and watch, which, in breach of the agreement, the defendant has fraudulently, as is alleged, failed to surrender.

PER CURIAM. Case remanded.

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(52)

J. P. H. RUSS v. ELIZA JONES, extrx. of LEROY JONES.

A testator, after leaving certain personal property to his widow, devises to her his lands in the following words: "Also my land and stock of all kinds, that I am in possession of; also all my other property," etc. "I also empower my wife to give to my daughter E., and to W. (his son), any of said property herein mentioned, at any time, or from time to time, as said wife may think proper": *Held*, that the widow had only a life estate in the land, and that she had no power to convey the same by deed or otherwise to any person whatsoever, except her children named.

(*Young v. Young*, 68 N. C., 309, cited and approved).

CREDITOR'S BILL, heard by *Tourgee, J.*, at Special (January) Term, 1874, of WAKE.

The plaintiff, in behalf of himself and all others, the creditors of Leroy Jones, deceased, brings this action to subject certain lands to the payment of their debts.

Leroy Jones, the testator of defendant, died in 1864. His will was duly proved and the defendant, his wife, qualified as

executrix, and took into her possession all his personal estate. This being insufficient to pay his debts, his creditors insisted on a sale of the real property in his possession at his death, including the tract of land upon which he resided. The defendant refused to institute proceedings to sell the land, claiming the same as her individual estate, and denying that it belonged to her husband, her testator.

The land formerly belonged to Solomon Bledsoe, who was the father of the defendant, and who at his death in 1840 devised the same with other lands to his widow, Mary Bledsoe, as follows:

"I bequeath to my beloved wife, Mary Bledsoe, all my property not given away, after all my just debts are paid; all my negroes, to-wit, Will," etc., "also my other property, household and kitchen furniture, plantation tools, etc. I also empower my wife to give to my daughter Eliza H. Jones" (the defendant) "and William C. Bledsoe any of said property herein mentioned, at any time, (53) or from time to time, as said wife may think proper."

On 29 July, 1844, the widow, Polly, conveyed the tract of land now the subject of this controversy, by deed, in fee, to the said Leroy Jones, testator of defendant, who entered into possession of the same and continued to occupy it, claiming title under said deed, until his death in 1864. The widow, Polly, lived with Jones for some four years before his death; and he and her son William gave her money from time to time as her necessities required. The inducement to make this deed to Jones was to enable him to vote in the Senate, which at that time required a certain quantity of land to enable him to do so.

Polly Bledsoe, the widow of Solomon, died in 1861, leaving a will in which she devised the land now sought to be sold to the defendant, her daughter.

The plaintiff insists that Leroy Jones was seized in fee of the said land under the deed of the widow of Solomon Bledsoe, and that the same is liable to be sold, with his other real property, to pay his debts.

The defendant claims that the land belongs to her; alleging, first, that the deed to her husband, Jones, was void, as the widow Polly, her mother, had no power to make a deed; second, that it was void or ineffectual to convey said land

because of the uncertainty of the description contained therein; third, that the said widow of Solomon Bledsoe having by her will given to her, the defendant, personal property, which *jure maritii,* became the property of her husband Leroy Jones, and also having given to her, the defendant, the said tract of land, her husband was bound to elect whether he would take the personal property under the will and give up the land to the devisee therein, or hold the land under the deed and surrender the personal estate to the legatee; and that under the facts of this case he was presumed in law to have taken the personal estate under the will.

(54) His Honor was of opinion that the doctrine of election did not apply to the case according to the facts stated, there being no ground to compel the said Leroy Jones to elect whether he would claim under the deed or under the will, and that there was no presumption that he claimed under the will instead of under the deed.

2. That the deed was not void or inoperative for uncertainty.

3. That under the will of Solomon Bledsoe, the devisee Mary Bledsoe took only a life estate in the said land and could only convey a life estate to said Jones; and therefore the defendant took an estate in fee simple under the will of the said Mary.

Judgment accordingly, dismissing the action, from which judgment plaintiff appealed.

Batchelor, Smith & Strong, for appellant.
Fowle and *Battle & Sons, contra.*

SETTLE, J. Unless we entirely discard the latter portion of Solomon Bledsoe's will we are forced to the conclusion that it was his intention to give his estate to his wife for life only, coupled, however, with a power in her to dispose of the same, either during her life or at her death, to his two children, Eliza H. Jones and William C. Bledsoe.

It is clear that his children were the objects of his bounty as well as his wife. This is the result, if we give to every key its proper sound. It follows that Mary Bledsoe had no power to convey the lands of Solomon Bledsoe, by deed or otherwise, to any person except the children of the said Solo-

mon, and the only legitimate exercise of the power with which she was clothed is to be found in her will, by which she devised the remainder of the estate, limited to her for life, to the two children of the said Solomon.

The questions here involved have often been before the courts, and in support of the positions here announced we deem it unnecessary to do more than call attention to the case of *Young v. Young,* 68 N. C., 309, and the (55) authorities there cited.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

D. H. HILL v. THE BOARD OF ALDERMEN OF THE CITY OF CHARLOTTE.

A municipal corporation is not liable to an action for damages, either for the non-exercise of, or for the manner in which, in good faith, it exercises discretionary powers of a public or legislative character.

(*Meares v. Commissioners,* 31 N. C., 73, cited and approved).

ACTION for damages, tried before *Schenck, J.,* upon the complaint and demurrer at Fall Term, 1874, of MECKLENBURG.

The defendants demurred to the complaint of the plaintiff, and on the hearing his Honor overruled the demurrer. From this judgment defendants appealed.

All the facts pertinent to the points raised and decided in this Court are stated in the opinion of *Justice Rodman.*

Jones and *Johnson,* for appellants.
Wilson & Son and *Brown, contra.*

RODMAN, J. The complaint alleges that the defendant is a corporation authorized "to make all ordinances, rules and regulations for the good government, health and safety of the property and persons in said city, not inconsistent with the laws of the State or of the United States, and to impose penalties for the breaking or infringement of any laws or ordi-

nances by them established." That in pursuance of
(56) this authority the authorities of the city, in 1871,
adopted an ordinance which prohibited all persons from firing guns or pistols, or exploding any squibs or fire-crackers within the limits of the city under a penalty of five dollars for each offense. It prohibited also the use or exhibition of fire-works, etc., within the limits of the city, without the written permission of the Mayor, under a penalty of twenty dollars for each offense, etc.

On 15 December, 1873, the defendant, in disregard of its duty, etc., passed an ordinance suspending the above ordinance from 25 December, 1873, to 1 January inclusive. On the evening of 1 January, 1874, a crowd of boys and men collected in a street of the city near a building of the plaintiff, and there negligently fired off squibs, fire-crackers, roman candles, etc., whereby the said building caught fire and was burned, to the damage of the plaintiff, etc. The defendants demurred.

We conceive that nothing can be clearer than that when a general authority is given to a municipal corporation, to be exercised through its proper legislative officers, to make ordinances for the good government, health and safety of the inhabitants and their property, it is thereby left entirely to the discretion of those authorities to determine what ordinances are proper for those purposes. Such a charter gives powers, and in a moral sense imposes duties, for in that sense there can be no power to be used for the benefit of others that does not carry with it a moral obligation to use it to the best of the grantee's judgment and ability for the purpose for which it is given. But it does not impose such distinct and specific duties as to enable a court to say in any given case that they have not been performed. If a court should undertake to say that, by reason of this general grant of power, it was the duty of the municipal authorities of Charlotte to pass and retain in force an ordinance prohibiting the use of fire-crackers, etc., and that the city was liable to any person damaged by reason of such omission, there is no reason why the
Court should not adjudge the city liable in every case
(57) where the authorities had omitted to pass any other
ordinance which, in the opinion of the Court, would have been proper for the good government of the city, or the

health or safety of the inhabitants, or of their property. A court assuming to do this would arrogate to itself the legislative power of the city authorities, and it cannot be supposed possible that any court will be guilty of such an usurpation.

Undoubtedly a charter, or other statute, may imperatively impose on a municipal corporation a well-defined duty of such a character that a person injured by its neglect will be entitled to damages, although the statute does not *directly* impose this liability. As where a city is empowered to keep the streets and sidewalks in repair. Cooley Const. Lim., 247; *Meares v. Commissioners,* 31 N. C., 73.

But in this case it was evidently left to the discretion of the authorities to determine from time to time what ordinances were proper for the ends in view. It may have been wise or not to pass the ordinance cited, and wise or not to suspend its operation. Some cities have such ordinances, others have not; probably in most the firing of crackers is tolerated on public holidays. But the question, whether wise or not, is not for a court to determine.

The principle we have stated is amply sustained by the authorities. Dillon Mun. Corp., sec. 753, thus states his conclusion upon a review of the cases:

"A municipal corporation is not liable to an action for damages either for the non-exercise of, or for the manner in which, in good faith, it exercises discretionary powers of a public or legislative character."

In *Wilson v. New York,* 1 Denio, 595, the Court say: "The civil remedy for misconduct in office is more restricted and depends exclusively upon the nature of the duty which has been violated. Where that is absolute, certain and imperative—and every ministerial duty is so—the (58) delinquent officer is bound to make full redress," etc.

"But when the duty alleged to have been violated is purely judicial, a different rule prevails, etc. And although the officer may not in strictness be a Judge, still if his powers are discretionary, to be exerted or withheld according to his own view of what is necessary and proper, they are in their nature judicial, and he is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed."

In *Kelly v. Milwaukee,* 18 Wis., 83, it appeared that the city had power by its charter to prevent swine, etc., from running at large, and had neglected to pass any ordinance in pursuance of that power. A hog running at large in the streets entered the premises of the plaintiff and injured some clothes, for which he brought the action. The opinion of the Court is a very sensible one, and the judgment is for the defendant.

PER CURIAM. Judgment reversed and demurrer sustained.

Cited: Bunch v. Edenton, 90 N. C., 434; *Moffitt v. Asheville,* 103 N. C., 255; *Board of Ed. v. Comrs.,* 113 N. C., 388; *Love v. Raleigh,* 116 N. C., 305; *Coley v. Statesville,* 121 N. C., 316; *S. v. Hill,* 126 N. C., 1144; *McIlhenney v. Wilmington,* 127 N. C., 149.

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(59)

OWEN G. SHEHAN v. JOHN MALONE & CO.

1. In a petition by the defendants to rehear a case decided in this Court for the purpose of having a new trial in the Court below on account of newly discovered testimony, the affidavit set forth "that one Fennell was the book-keeper for the defendants in their store; that said books show from the entries made by said Fennell that the plaintiff bought out of said store," etc., and "that said books were not allowed to be used in evidence, for the reason that said Fennell was not there to prove them," etc., and "that they had used every effort to find Fennell, but had failed"; and "that since the trial they had discovered that he is now living in Chattanooga"; * * * "that the recovery is a hardship," etc., "for that said books which were offered in evidence were excluded," etc., and that "said books would show," etc.: *Held* to be insufficient to justify the setting aside a former judgment of this Court, and granting a new trial.

2. In such an affidavit it is not sufficient for the affiants to state that they had used *every* means to find out where the witness was, etc.; they ought to have stated what means they did use, and let the Court judge.

(*Bledsoe v. Nixon,* 69 N. C., 81, cited and distinguished from this).

PETITION by the defendants to rehear the case between the same parties, decided at the last (June) term of this Court.

The case is reported in 71 N. C., 440, in which the facts are all fully stated. The grounds relied on for a rehearing are sufficiently set out in the opinion of the Court.

Gaither & Bynum and *Folk & Armfield,* for the petitioners.

Scott & Caldwell and *Furches, contra.*

READE, J. The plaintiff brought his action against the defendants to recover money claimed to be due under a contract. Among other defenses the defendants set up a counter-claim for goods, wares and merchandise furnished the plaintiff out of their store. It was referred to a referee to state an account between the parties, and in order to prove their counter-claim before the referee the defendants offered their store books in evidence upon which the goods (60) were charged, and the books were rejected as incompetent evidence. The plaintiff had judgment, and the defendants appealed to this Court, where the judgment was affirmed. *Shehan v. Malone,* 71 N. C., 440.

At the present term of this Court a motion is made in that cause by the defendants to rehear the case in this Court, with the view to have the case remanded to the Court below, and a new trial there upon the ground of "newly discovered testimony."

This motion is founded upon an affidavit setting forth "that one Fennell was the book-keeper for the defendants in their store. That said books show from the entries made by said Fennell that the plaintiff bought out of said store," etc., and "that said books were not allowed to be used in evidence for the reason that said Fennell was not there to prove them," etc.; and "that they had used every effort to find Fennell, but had failed"; and that since the trial they have discovered that he is living in Chattanooga; that the recovery is a hardship, "for that said books which were offered in evidence were excluded," etc.; and "that said books show," etc., and "this they are now able to show by the said Fennell," etc.

Applications for new trials for newly discovered testimony are entertained with great caution. It often happens after a trial that the losing party discovers some slip or mishap which may have operated to his disadvantage. He sees, or

imagines that he sees, where he might have turned the scales if he had not neglected this, or if he had avoided that; and so the temptation is great to strain, if not to invent, a point for another trial. But it is important that there should be an end of litigation. The first trial is usually as fair as any, and there is danger that in indulging the imaginary rights of one party we may jeopardize the real rights of the other. Illustrative cases where new trials have been granted for newly discovered evidence are where a plaintiff has recovered a debt, and the defendant subsequently discovers a receipt which, without his fault, could not be used on the trial,
(61) or the discovery of a lost deed, as in *Bledsoe v. Nixon,* 69 N. C., 81. These are clear cases, but they are not the only ones. In any case, however, it ought satisfactorily to appear that injustice has been done without the fault of the party, and that it may be rectified by a new trial.

In this case the store books were rejected as evidence. It is admitted that they were not evidence; but it is supposed that they would have been evidence if the book-keeper had been there to prove them. Not at all. It is not alleged that he was the salesman and could have proved the delivery of the goods, but that he was the book-keeper and could have proved the books, that is, that he made the entries, and then the books would have proved the claim. And then they say this they expect to prove by him at next term. So that for aught that appears, upon another trial the witness would be asked: Did you keep these books? Yes. Did you make these entries? Yes. Did you deliver the goods or know that they were delivered? No.

Again: Sufficient reason is not given for the absence of the witness. They say they used *every* means to find out where he was, etc. But that makes them the judge; whereas they ought to have stated what means they did use, and let the Court judge. If they had inquired at Chattanooga they would have found him there; and they may have had good reasons for not inquiring there, but they have not stated them.

Again: A continuance is the usual means asked for to enable a party to hunt up a lost witness, but it does not appear that a continuance was asked for.

If a new trial had been asked for in the Court below, at or after the trial term, for the cause now assigned, it would not have been sufficient. But a stronger case would have to be made now than then, for there was an appeal to this Court and a judgment here, and no reason is given why the motion was not made on the trial and before judgment in this Court. It is true that it is stated that the testimony has been "recently" discovered, but that may not mean since the trial in this Court. (62)

There is but one precedent for a motion in this Court, after judgment here, to set aside the judgment here and grant a new trial in the Court below for newly discovered testimony, and that is the case of *Bledsoe v. Nixon, supra.* The necessity for it seems to arise out of our new system. It is an inconvenient practice and not to be encouraged, nor will it be allowed except in cases of necessity to prevent manifest injustice. And in that case the cause was not remanded and a new trial awarded, but the cause was retained in this Court and an issue directed below to try the single matter in dispute. And such would have been the course in this case if we had granted the motion.

PER CURIAM. Motion refused with costs.

Cited: Henry v. Smith, 78 N. C., 29; *Dupree v. Ins. Co.,* 93 N. C., 245; *Sikes v. Parker,* 95 N. C., 235-7; *Black v. Black,* 111 N. C., 303; *Turner v. Davis,* 132 N. C., 190.

WILLIAM A. SMITH v. RICHMOND AND DANVILLE R. R. CO.

In an appeal by a defendant to the Superior Court from a judgment of a justice of the peace, it lies within the discretion of the presiding Judge to require the plaintiff to give security for the further prosecution of the suit, or not.

(*Osborne v. Henry,* 66 N. C., 354, cited and distinguished from this).

MOTION for plaintiff to give security for the further prosecution of his suit, heard before *Schenck, J.*, Fall Term, 1874, of CABARRUS.

Plaintiff sued defendant for damages in a justice's court, and obtaining judgment, the defendant appealed. On the trial

in the Superior Court the defendant moved (having filed an affidavit of the plaintiff's insolvency) that the plaintiff be required to give security for the further prosecution
(63) of his suit, and on his failure to do so that the suit be dismissed.

The case states that "this motion is claimed as a question of right by the defendant." His Honor refused the motion, and the defendant appealed.

Barringer and *Bailey,* for appellant.
Montgomery, contra.

RODMAN, J. The plaintiff recovered judgment before a justice of the peace, and the defendant appealed to the Superior Court, where he moved the Judge, as *matter of right,* to require the plaintiff to give a bond with surety for the prosecution of his action, and on his failure to do so to dismiss his action.

We think that under secs. 295 and 393, C. C. P., and also under ch. 31, sec. 109, of the Revised Code, the Judge had the *power* to require the plaintiff to secure the defendant's costs. Probably he would have this power even in the absence of any statute expressly giving it, by virtue of his general power over the process and proceedings in his Court. But there is no act of Assembly, nor any rule of law, which makes it imperative upon a Judge to require such security in all cases. A statute provides that a party may sue in a Superior Court as a pauper, and without a prosecution bond. It follows that he may be permitted in like manner to prosecute a case brought into the Superior Court by appeal from a justice. The decision of the matter rests entirely in the discretion of the Judge. Perhaps if it appeared in any case that this discretion had been grossly abused, it might be possible for this Court to give relief. But there is no pretence of that sort here. *Osborne v. Henry,* 66 N. C., 354, is not in point.

PER CURIAM. Judgment affirmed.

(64)

WILLIAM EDGERTON v. JOHN H. POWELL, administrator, and others.

An action brought to foreclose a mortgage upon a tract of land cannot be joined with an action to recover the possession of another tract of land, the causes not arising out of the same transaction, or transactions connected with the same subject of action.

ACTION, tried before *Buxton, J.,* at January (Special) Term, 1874, WAYNE.

All the facts necessary to an understanding of the case are stated in the opinion of the Court.

Battle & Son, for appellant.
Smith & Strong and *Smedes, contra.*

READE, J. The plaintiff held certain bonds against Samuel Pate and a mortgage to secure the same on a moiety of a tract of land, the said Pate retaining the other moiety. Samuel Pate died, and the plaintiff commenced this action to foreclose the mortgage by a sale of the moiety covered by the mortgage, and for an account of the assets in the hands of the administrator, and a satisfaction of any balance that might remain after a sale under the mortgage. The defendants are Powell, the administrator of Samuel Pate, and the other defendants his heirs at law to whom the land descended. The defendants answer, admitting the facts alleged in the complaint, except that they deny that the amount due the plaintiff is as much as alleged, and they agree to a sale for foreclosure, and insist that any balance due the plaintiff ought to be paid out of the personal assets of the intestate. And they allege that the intestate, subsequent to the mortgage, conveyed to the defendants, other than Powell, the moiety of said land not covered by the mortgage.

What was done under the complaint and answer does not appear. The answer was put in in January, 1873.

In March, 1873, the plaintiff filed an amended (65) complaint in which is set forth that the defendant Powell, administrator, had, under a decree of Court regularly obtained in a proceeding in which the other defendants were parties, sold the moiety of the land not mortgaged, for assets to pay debts of the intestate, and that at the sale the plaintiff

bought that moiety and took a title from the administrator, and he demands judgment for that moiety of the land claimed by the defendants, the heirs of the intestate, who claim to have bought for value of the intestate. These defendants answer the amended complaint and set up their title, and they say that they appeared before the Probate Judge who ordered the sale and objected to the order.

There are two distinct causes of action: First, to foreclose a mortgage upon one tract of land, and second, to recover the possession of another tract of land. These causes do not "arise out of the same transaction, or transactions connected with the same subject of action," and therefore they cannot be joined. C. C. P., sec. 12.

It does not appear in the record what was done in the Court below as to the first cause of action; only what was done as to the second cause is brought up by the appeal, and as to that there is error.

As the whole case is not brought up, it cannot be disposed of in this Court. It must be remanded, that the parties may proceed as they may be advised.

The appellee will pay the costs in this Court.

PER CURIAM. Remanded.

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(66)

GEORGE HINCHEY v. JAMES W. NICHOLS and others.

Where, in a grant from the State, a tract of land is described as follows: "A tract of land containing 173 acres, lying and being in our county of Wilkes, on a big branch of Luke Lee's Creek, beginning at or near the path that crosses the said branch that goes from Crane's to Sutton's, on a stake, running W. 28 chains 50 links to a white-oak, in Miller's line, then N. 60 chains to a stake, then E. 28 chains 50 links to a stake, then S. 60 chains to the beginning," and no evidence being offered to show the location of Miller's line, or of the white-oak referred to: *It was held*, that the description is fatally defective, and cannot be made sufficiently definite by parol testimony.

(*Archibald v. Davis*, 50 N. C., 322; *Mann v. Taylor*, 49 N. C., 274, cited and approved).

EJECTMENT, tried before *Cloud, J.*, at Special Term, 1874, WILKES.

The plaintiff claimed the land in controversy under a grant from the State to one Globber in 1789, and by mesne conveyances through various persons to himself.

The description in the grant, and the said conveyances, is as follows: "A tract of land containing one hundred and seventy-three acres, lying and being in our county of Wilkes, on a big branch of Luke Lee's Creek, beginning at or near the path that crosses the said branch that goes from Crane's to Sutton's, on a stake, running west twenty-eight chains fifty links to a white-oak in Miller's line; then north sixty chains to a stake, then east twenty-eight chains fifty links to a stake; then south sixty chains to the beginning."

No evidence was offered on the trial as to the location of Miller's line, or the white-oak, but the plaintiff claims a point on the said path as his beginning, and then the courses and distances called for in the grant and deeds. Evidence was offered tending to establish the point claimed to be the beginning corner. The plaintiff proved by himself and two other witnesses that two old men, now dead, one of them a surveyor, had pointed out the point claimed by the plaintiff as his beginning, as the beginning of plain- (67) tiff's land.

The defendant requested the Court to charge the jury that as the white-oak in Miller's line, nor the line itself, nor any natural boundary or marked boundary of the said tract could be located or identified, as a mere matter of law no land could be recovered under these conveyances. His Honor declined so to instruct the jury, and charged them that "if they were satisfied the plaintiff had located the land, then they should return a verdict for the plaintiff."

The defendant excepted. The jury returned a verdict for the plaintiff, and the Court thereupon rendered a judgment in favor of the plaintiff, from which judgment the defendant appealed.

Furches, for appellant.
Folk & Armfield, contra.

PEARSON, C. J. The plaintiff claims a tract of land described as follows in the grant (1789) and mesne conveyances: "A tract of land containing one hundred and seventy-three acres, lying and being in our county of Wilkes, on a big branch of Luke Lee's Creek, beginning at or near the path that crosses the said branch that goes from Crane's to Sut-

ton's, *on a stake,* running west twenty-eight chains and fifty links to a white-oak in Miller's line," and so all around, calling for *stakes* at every corner.

"A big branch of Luke Lee's Creek" supposes several big branches. Which big branch, is left indefinite. If an indefinite description will admit of comparison, the next description, "a stake at or near the path that crosses the said branch that goes from Crane's to Sutton's," is more indefinite. We are not told on which side of the branch this stake or *point* was fixed; nor are we told whether it is ten, fifty, one hundred yards, or any other distance from the branch. So the description is fatally defective, and it cannot be made definite by parol evidence, for that would be to *make* a
(68) beginning corner, and not to *find* a *corner* by fitting the description to the thing, for nothing is described.

The cases, *Archibald v. Davis,* 50 N. C., 322; *Mann v. Taylor,* 49 N. C., 274, cited by the defendant's counsel, dispose of the question.

Had "the white-oak in Miller's line" been identified, the description may have been helped out and the beginning corner found by nursing the lines, but, unfortunately for the plaintiff, neither the white-oak nor Miller's line can be found. So that passes for nothing; and we have no description by which the land can be identified, and must come to the conclusion that the surveyor made the plat on which the grant issued without any actual survey, and without going into the woods at all to mark any corner, or fix any memorial by which the land can be located. Error.

PER CURIAM. *Venire de novo.*

Cited: Dickens v. Barnes, 79 N. C., 492; *Reed v. Reed,* 93 N. C., 466; *Blow v. Vaughan,* 105 N. C., 203-7; *Brown v. House,* 118 N. C., 885; *Holmes v. Sapphire Co.,* 121 N. C., 413; *Barker v. R. R.,* 125 N. C., 598.

J. R., B. F. and G. G. GARY, exrs., to the use of W. H. HARRIS and wife, v. JAMES JOHNSON and J. J. LONG.

An action brought by the original obligees of a note to the use of a *feme* plaintiff and her husband, is subject to be set off by an account for medical services rendered the *feme* plaintiff before her marriage.

ACTION on a bond for money, tried at Spring Term, 1874, of NORTHAMPTON Superior Court, before *Albertson, J.*, and a jury.

The plaintiffs declared in debt, before the Code of Civil Procedure, on two bonds amounting in the aggregate to $130, with interest, payable to the plaintiffs, executors of R. B. Gary, and executed by the defendant Johnson as principal and Long as surety. The bonds were transferred by the executors to the guardian of the *feme* beneficial (69) plaintiff, the wife of Smith, in part payment of a legacy coming to her under the will of their testator; and were transferred by said guardian, upon the majority of the *feme* plaintiff, to Smith, her husband, in part settlement of his guardian account. The execution of the bonds was admitted.

The defendants relied upon the plea of payment and set-off, and offered in evidence an account for medical services rendered by the defendant, Dr. James Johnson, to the said *feme* plaintiff and her slaves, during her minority and at the request of her said guardian, who at the time held the bonds now sued upon. The amount of the defendant's account and interest was about the same as that of the bonds. This evidence the Court excluded, and the defendants excepted.

The defendant then offered to prove that he had not made any effort to collect his account because he held it as an offset to said bonds. This was also excluded, and the defendants again excepted.

There was a verdict and judgment for the plaintiffs; from which judgment the defendants appealed.

Peebles, for appellants.

No counsel *contra* in this Court.

READE, J. The device of suing in the name of the original obligees to the use of the beneficial plaintiffs, instead of

in the name of the beneficial plaintiffs themselves, amounts to nothing. The defendant's set-off attached when the bonds were in the hands of the guardian of the *feme* beneficial plaintiff. And now it would be against conscience to allow them to be collected for her use out of the defendant, while she is indebted to the defendant an equal amount.

Per Curiam. *Venire de novo.*

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(70)

JOHN F. McLEAN, exr. of JOHN McLEAN, J. S. MILLER, trustee of the Church at New Sterling, and others, v. JOHN D. ELLIOTT and wife, MARY.

1. It is error in the Judge on a trial of a cause in the Court below to submit the competency of a witness as a question of fact for the jury. The competency of a witness is a question for the Court, to be raised when he offers to testify, and to be determined by the Court.

2. If a witness to a will is interested as a legatee thereunder, he is a competent witness to prove the will, the effect being to deprive him of the legacy. (Bat. Rev., ch. 119, sec. 10).

(*Wood v. Sawyer*, 61 N. C., 273, cited and approved).

Devisavit vel non, as to a paper-writing, propounded as the will of one John McLean, removed from Iredell to Catawba, where it was tried before *Mitchell, J.*, and a jury, at Fall Term, 1874.

The will of John McLean was proved in common form in the Probate Court of Iredell County. Soon after the defendants filed a *caveat* in the Superior Court, and his Honor ordered the following issues to be made up and submitted to the jury, to-wit:

1. Is the paper-writing propounded, or any part thereof, and if a part and not the whole, what part, the last will and testament of John McLean, deceased?

2. Is William B. Pressley, one of the subscribing witnesses to said paper-writing, interested under said paper-writing in any property which purports to be devised and bequeathed in said paper-writing; and if so, in what property and for what interest or estate?

The propounders moved to strike out the second of the above issues; to which the counsel of the caveators objected,

stating that they expected to prove on the trial that the said William B. Pressley was, at the time the same was signed and he became a witness, and still is, the pastor or officiating minister of New Sterling Church, mentioned in said will, and as such minister would be entitled under the will, if it was established, to an interest in the property (71) therein bequeathed.

His Honor ordered the said issue to be stricken out, and the case was removed to the Superior Court of Catawba for trial.

At the hearing the caveators moved to reinstate the issue before stricken out, which motion was refused and the parties went to trial upon the first issue. On the trial it was proved that the property of the testator, exclusive of that bequeathed to his sister Mary, the *feme* caveator, consisted of a tract of land, with about $1,000 worth of solvent credits, with a small quantity of wheat and corn. It was also in evidence that William B. Pressley, the witness to said paper-writing, was at the time of witnessing the same, and still was, a minister of said New Sterling Church, and as such received a salary from the members of said church. (The testator had devised and bequeathed to that church the residue of his estate after giving his sister a legacy, directing that the annual interest or proceeds of the bequest be appropriated yearly to the support of the minister.

The caveators asked his Honor to instruct the jury:

1. That said Sterling Church and the congregation as named and described in the will was not such a person as could take under the will; and that the will was void for the want of a legatee and devisee such as could take the property bequeathed and devised.

2. That if they believed from the testimony that William B. Pressley, one of the subscribing witnesses to said will, was interested, and entitled under the will to any of the property therein bequeathed or devised, they should find against the will as to the property and interest that was so bequeathed to him.

His Honor refused so to charge. Upon the issue submitted, the jury found for the will. Rule for a new trial; rule discharged. Judgment, and appeal by the caveators.

Folk & Armfield and *Scott & Caldwell,* for caveators.
Furches and *M. L. McCorkle, contra.*

(72) BYNUM, J. 1. The second issue submitted by the caveators was, "Is W. B. Pressley, one of the subscribing witnesses to the paper-writing, interested under it, and if so, in what property and for what interest or estate?" This issue, on the motion of the propounders, was struck out by the Court. It is a novel proceeding to attempt to submit the competency of a witness as a question of fact for the jury. His competency is a question for the Court, to be raised when he is offered as a witness and to be then determined by the Court. If the law were otherwise, a lawsuit would be almost interminable.

2. Was Mr. Pressley a competent witness to establish the will? Even assuming that he was interested as a legatee under the will, yet Bat. Rev., ch. 119, sec. 10, in express terms makes him a competent witness to prove the will, the effect being to deprive him of the legacy after the will is established. Whether he does take an interest under the will is not now a question before the Court. If doubts are entertained upon that point by those who are interested, and a construction of the will by the Court is desired, proceedings to that end must be properly instituted. Ingenious and well-considered arguments upon the proper construction of the will are submitted by the counsel for the propounder, but we are precluded by the rules of this Court from entering upon an inquiry wholly collateral to the issues now before the Court. *Wood v. Sawyer,* 61 N. C., 273.

PER CURIAM. Affirmed.

(73)

THE CAROLINA CENTRAL RAILWAY COMPANY v. THE CITY OF WILMINGTON.

1. Sec. 10, ch. 5, Private Laws of 1868-'69,* which authorizes the Mayor and Aldermen of the city of Wilmington, from time to time, to assess the value of property within the city for taxation by the city, is unconstitutional. (Const., Art. V, sec. 3).

2. Art. VII, sec. 9, of the Constitution, clearly implies that the valuation upon which city taxes are to be uniformly levied is to be that assessed by the Township Trustees.

INJUNCTION to restrain defendant from collecting taxes, tried before *Russell, J.,* at June Term, 1874, of NEW HANOVER.

The plaintiff complained that the defendant threatened, and was about to enforce, the collection of a certain tax of $220 on its real estate, situated in the city, which the plaintiff insisted was illegal. The defendant insisted upon the legality of the tax and demanded immediate payment. The following are the facts agreed:

The city of Wilmington is embraced in the township of Wilmington. In 1873 all the real estate in the township of Wilmington was re-assessed for taxation. This assessment was made by three assessors appointed by the Board of Aldermen for the city of Wilmington, who acted together with the Township Board of Trustees. The real estate of the plaintiff situated within the city and the township of Wilmington was assessed at $46,000. When the valua- (74) tion was returned to the Board of County Commissioners for the county of New Hanover the board revised the

*NOTE.—Sec. 10 of the charter of Wilmington, reads:

SECTION 10. That the Mayor and Aldermen may cause an assessment of the real estate of the city at such time or times and in such manner as they may deem expedient, and shall have power to tax all subjects of taxation which are now liable to be taxed either by State or county under existing laws or any laws that may be hereafter enacted; and if any person shall render an account of their personal property liable to taxation, which, in the judgment of the Mayor and Aldermen, is below the value, it shall be the duty of said Mayor and Aldermen to appoint three freeholders to assess and value the same according to the true cash value of said property, and levy the tax according to said valuation so made by said freeholders.

list, and upon complaint of plaintiff, reduced the valuation of said real estate from $46,000 to $35,000. The city claimed the right to collect the city taxes on the additional $11,000. Thereupon the plaintiff applied to the Board of Aldermen of the city of Wilmington, and made its written complaint that the valuation of the property at $46,000 was excessive, and prayed that the same should be reduced so as to correspond with the valuation made by the Board of County Commissioners.

The Board of Aldermen refused the prayer of the plaintiff.

The questions submitted to the Court upon this case are as follows:

1. Have the Board of Aldermen the power to alter, in any way, the assessed value of the real estate within the city of Wilmington, when said real estate shall have been assessed for the purposes of taxation by assessors appointed by the board?

2. The Board of County Commissioners for New Hanover County having revised the assessment of the real estate of the Carolina Central Railway Company situated within the limits of the city, and having reduced the valuation thereof, upon the petition of said railway company, is their action binding upon the Board of Aldermen, and are they bound to make a corresponding reduction in the value of said real estate?

It was agreed that, if these questions were answered in the affirmative, or if the second question was answered in the affirmative, then judgment was to be given for the plaintiff for cost, and the defendant was to be perpetually restrained from collecting said tax. If the first question was answered in the affirmative and the second in the negative, judgment was to be given for cost, in the discretion of the Court, and an order to be made to defendant to proceed to revise the said assessment and reduce the same or not,
(75) as they may determine. If both questions were answered in the negative, then there was to be a judgment against the plaintiff for cost and for $220, the whole amount of the taxes claimed.

The Court gave judgment against the plaintiff for cost and $220, the amount of the tax claimed.

Smith & Strong, for appellant.
M. London, contra.

RODMAN, J. The question is, whether a clause in the charter of the city of Wilmington (Private Act 1868-'69, ch. 6, sec. 10) which authorizes the Mayor and Aldermen of that city from time to time to assess the value of property within the city for taxation by the city is constitutional. We are of opinion that it is not. The Constitution, Art. V, sec. 3, provides that all property shall be taxed by *an uniform rule.* It is true that the Constitution is here especially providing for and speaking in reference to taxation by the State and counties, but the language is general enough to cover taxation by every municipal corporation having a power to tax. Art. VII, entitled "Municipal Corporations," after providing by sec. 6 that the township trustees should assess the taxable property of their townships, proceeds, in sec. 9, to enact that all taxes levied by any county, city, town or township shall be uniform and *ad valorem* upon all property, etc. This section, being placed where it is, clearly implies that the valuation upon which city taxes are to be uniformly levied is to be that assessed by the township trustees.

Taxation cannot be "by an uniform rule" if each municipal corporation can assess the property liable to it at a different value. Every city must be either a township or part of one, and there can be no reason why the valuation of the township trustees should not suffice for city taxation, as it does for taxation by the State, county, and township. Valuations by distinct authorities are an unnecessary expense and annoyance to the citizen. The more general in its application a law can be made, the more likely it is to be un- (76) derstood, remembered and obeyed. Special regulations, applying only within certain limited localities, serve only to perplex all but professional experts and continue to oppress the ignorant.

The Mayor and Aldermen of Wilmington must be governed in their levy of city taxes by the valuation of the township trustees.

PER CURIAM. Judgment below reversed, and judgment for the plaintiff according to the case agreed.

Cited: Cobb v. Elizabeth City, 75 N. C., 7; *Covington v. Rockingham,* 93 N. C., 138; *Wiley v. Comrs.,* 111 N. C., 400.

THE TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA v. ALEXANDER MCIVER.*

1. The amendment to the Constitution, Art. IX, sec. 13, adopted by the General Assembly, February, 1873, was adopted and ratified by the people in accordance with the provisions of the Constitution, Art. XIII, sec. 2, and is a part thereof.

2. The Act of 1873-'74, ch. 64, providing for the election of trustees of the University, was passed in accordance with the provisions of the Constitution, and the trustees elected under that act were properly elected.

CIVIL ACTION, brought to Spring Term, 1874, of ORANGE County, and heard upon the plaintiffs' demurrer to the answer of the defendant, before *Tourgee, J.*, at chambers, 12 June, 1874.

The plaintiffs, claiming to be trustees of the University of the State, being elected as prescribed by the Act of
(77) 1873-'74, ch. 64, entitled "An act to provide for the election of trustees of the University of North Carolina," which act was passed in pursuance of sec. 5, Art. IX, of the amended Constitution, bring this action against the defendant, the Superintendent of Public Instruction, to recover the books, records, seal and other property of the University, in the custody of the defendant by order of the Board of Education.

The defendant in his answer denies that the plaintiffs are the trustees of the University, alleging that the amendments to the Constitution, as proposed by the Act of 1871-'72, ch. 53, and passed again by the requisite majority 24 February, 1873 (Act of 1872-'73, ch. 86), and submitted to the people for ratification or rejection by the Act of 1872-'73, ch. 153, were never passed and ratified according to the requirements of sec. 2, Art. XIII, of the Constitution, and are therefore no part thereof. And for a second defense the defendant insists that if the amendments were duly passed and ratified, still the election of trustees by the General Assembly, under the Act of 1873-'74, ch. 64, was not authorized by those amendments and is consequently void.

*NOTE.—This case was argued at the last (January) term, but on account of the illness of the *Chief Justice*, who could not be present, and the disagreement of the members of the Court upon one of the points, an *advisari* was taken to this term.

The plaintiffs demurred to the defendant's answer, alleging that the Court was bound by the certificate of his Excellency the Governor, attested by the Great Seal of the State and deposited in the office of the Secretary of State, and that his Honor, in this investigation, had no authority to look behind that certificate; and as to the second defense of the defendant, the plaintiffs insist that the Legislature, having "power to provide for the election of trustees," was the sole judge of the manner in which that power should be exercised.

His Honor being of opinion with the defendant upon both the questions raised by the pleadings, overruled the demurrer, from which judgment the plaintiffs appealed.

Moore & Gatling, Battle & Son and *J. W. Graham,* for appellants.

Batchelor, contra.

BYNUM, J. The provision of the Constitution, be- (78) fore the amendment now to be construed, was as follows: "The Board of Education shall elect trustees of the University as follows: One for each county in the State, whose term of office shall be eight years." Art. IX, sec. 13. The amendment to the Constitution strikes out sec. 13 and substitutes the following: "The General Assembly shall have power to provide for the election of trustees of the University," etc. After this amendment was adopted and declared to be a part of the Constitution the General Assembly passed an act in these words: *"The General Assembly of North Carolina do enact:* In pursuance of the authority granted by sec. 5 of Art. IX of the amended Constitution, that there shall be sixty-four trustees of the University of North Carolina elected by joint ballot of both Houses of the General Assembly, on 29 January, 1874, whose term of office shall be eight years," etc. In pursuance of this act trustees were elected, who bring this action for the corporate property of the University.

Two questions are made: 1. Was this amendment duly ratified, so as to become a part of the Constitution? 2. Supposing the amendment to have been duly ratified, was the election of trustees in conformity therewith?

The Constitution provides two modes for its amendment—one by a convention to be called by the General Assembly, and the other provision is as follows: "No part of the Constitution of this State shall be altered unless a bill to alter the same shall have been read three times in each House of the General Assembly and agreed to by three-fifths of the whole number of members of each House respectively; nor shall any alteration take place until the bill so agreed to shall have been published six months previous to a new election of members to the General Assembly. If after such publication the alteration proposed by the preceding General Assembly shall be agreed to, in the first session thereafter, by two-thirds of the whole representation in each House of the General Assembly, after the same shall have been
(79) read three times, on three several days in each House, then the said General Assembly shall prescribe a mode by which the amendment or amendments may be submitted to the qualified voters for members of the House of Representatives throughout the State; and if upon comparing the votes given in the whole State, it shall appear that the majority of the voters voting thereon have approved thereof, then, and not otherwise, the same shall become a part of the Constitution." Art. XIII, sec. 9.

Under this provision a bill was duly passed by our General Assembly, which contained seventeen amendments, including therein the one in relation to the University. After a new election, the next General Assembly rejected nine and adopted eight of these amendments, which had all been previously incorporated and adopted in one bill, but incorporated each of the nine amendments in a separate bill, and in that form submitted them to the vote of the people, who approved of each amendment by a majority of nearly forty thousand votes.

It is insisted that these amendments were not constitutionally adopted, and are therefore invalid. The argument is, that the Constitution contemplated and required that the same bill and the same amendments, without change, should have the approval of each General Assembly, and that it by no means followed because the second General Assembly adopted separately eight out of seventeen amendments adopted by the first General Assembly, that it would have

adopted the seventeen or any of them, if they had been voted upon by the second body, in the form adopted by the first body. And it is urged that the second General Assembly, in fact, did reject them in that form, and only adopted eight of them, and that only after shaping them into eight separate bills. And that conversely, it does not follow because the second General Assembly adopted eight of the amendments in eight separate bills the first General Assembly would have so adopted them or any of them, for that some one or more of the amendments rejected by the second General Assembly might have been the including cause of the adoption of the seventeen as a whole by the first General Assem- (80) bly. And that thus there was not the concurrence of two Legislatures upon the same amendments, according to the words and spirit of the Constitution.

Constitutions lay down general propositions, and do not deal in details, leaving these to be worked out by the Legislature. If it can be shown that these amendments or any of them have not been made in accordance with the rules prescribed by the fundamental law, every principle of public law and sound policy requires the Court to pronounce against them. But this cannot be shown. They have been adopted in accordance with the language of the Constitution, because each amendment has passed through all the forms of legislative enactment prescribed by that instrument. They do not violate the spirit of the Constitution in the manner of their adoption, for although they finally assumed the shape of eight separate bills, they are yet the eight identical amendments adopted by the first Legislature, and it cannot be shown why the amendments adopted in eight bills would not have been as valid in one bill, as originally passed, or why they should have been less valid because they were adopted in eight bills instead of one. The substance and even the precise form of the amendments adopted were the same and unaltered from their inception to their consummation in the Constitution. The proposed amendments were of distinct and independent parts of the Constitution, and were as much so when incorporated in one bill as when incorporated in eight bills. There is nothing in our law which requires, as in some States, that each subject-matter of legislation shall be put in a separate bill. These amendments are therefore just as valid in one

bill as in the eight bills, and it appears change was a matter of supererogation, more calculated to raise doubts than to solve them. But the amendments do not derive their force from the Legislature which devised them, but from the people who ratified them, and in this case they have spoken with no uncertain sound. Had a convention framed these amendments,
(81) it unquestionably would have had the power to submit them to the people as one act or several. The power of the General Assembly cannot be distinguished from the powers of a convention upon the question of submitting its amendments to popular vote. When the voice of the people is constitutionally expressed in their favor the amendments become and are a part of the fundamental law.

At the last term all the members of the Court then present concurred in the opinion that the amendments to the Constitution were duly ratified, and it was so publicly announced from the Bench on the argument. The opinion was not then filed, because the Chief Justice was absent by reason of sickness, and it is always desirable to have a full Court on constitutional questions, and because it was doubted by some of the Court whether the action of the Legislature, in electing trustees of the University, was in conformity to the Constitution as amended.

The provision of the Constitution, as amended, is that "The General Assembly shall have power to provide for the election of trustees of the University," etc. Accordingly, that body did enact as follows: *"The General Assembly of North Carolina do enact:* In pursuance of the authority granted by the fifth section of the ninth article of the Constitution, that there shall be sixty-four trustees of the University of North Carolina elected by joint ballot of both Houses of the General Assembly," etc. Looking at this act of the Legislature by itself, without reference to the Constitution, there can be but one construction put upon it, and that is that it does "provide for the election of trustees of the University," and is a literal compliance with that provision of the Constitution as amended. It is, however, objected that it was not the meaning of the Constitution that the body to "provide for the election" should have the power to make the election. Why not? The Constitution does not forbid it, nor does it desig-

nate any electoral body by which the election is to be made. In conferring upon the General Assembly the power to provide for the election of trustees the whole power of the Constitution upon the subject was exhausted, and the (82) Legislature became clothed with the supreme power, unless it may be limited by other parts of the Constitution. It is no argument to urge that it was indelicate for the same body which provided for the election of trustees afterwards to proceed itself to make the election; for it is a question of power and not one of etiquette in its exercise. But even here we have innumerable examples in the political history of this country where both constitutional and legislative bodies have first created offices and then proceeded to fill them, even out of the members of the very bodies which created the offices. This is not unusual in American history.

Suppose a merchant in Raleigh should direct his agent in New York "to provide for" the shipment of a cargo of cotton to Liverpool. Would it be less a compliance with the order because the agent himself furnished the shipping instead of hiring it from others? When the Constitution or an individual authorizes a thing to be done, and no more, the manner of doing it is left to the agent. There is not only nothing in this article of the Constitution forbidding the Legislature to elect trustees, but there is no reason which makes such election inconsistent with the spirit of the instrument. What was the evil this amendment to the Constitution was intended to remedy? Prior to the amendment, the Constitution provided that the trustees should be elected by the Board of Education, and the Legislature had but a limited control of the University, and under that system, or from other causes, the University had languished and had finally suspended operations. But under the old Constitution, in force prior to the war, the trustees were elected by the Legislature and the institution was under its control, and in that capacity had flourished and was regarded by its friends as the pride and ornament of the State. Now the purpose of the amendment under discussion avowedly was, and the public debates resulting in this amendment show beyond cavil, that its purpose was to restore the University to the same form of government which existed under the old Constitution, and which, it was believed

(83) by its advocates, would restore that school of learning to its former prosperity and reputation. Accordingly, we find that the very legislative body which adopted this amendment and was conversant with its meaning, immediately upon its ratification passed the act we are now construing, and provided therein for the election of trustees as they were elected before the war. Thus the very legislative body which drafted the constitutional amendment gave a legislative construction of the meaning of its terms. This interpretation, therefore, is entitled to peculiar respect. *Lewis' case,* 29 Penn., 578; Brightly on Elections, 667, 677, 678, and cases in note: *Ex-parte Dodd,* 6 Eng., 152; *Ogden v. Sanders,* 12 Wheat., 291; Cooley, 69; Story on Const., 407.

But the objection is made that sec. 10, Art. III, of the Constitution, prohibits the Legislature from making this election. That section is in these words: "The Governor shall nominate, and by and with the advice and consent of a majority of the Senators-elect, appoint all officers whose offices are so established by this Constitution, or which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly." Now, it is clear that this section of the Constitution was not meant to prohibit the General Assembly from electing any officer at all, for secs. 11, 20 and 22 of Art. II, and sec. 3, Art. VI, provide in express terms for the election of certain officers by the General Assembly. The true construction of this section of the Constitution is, that it prohibits the election by the General Assembly only of "those officers whose appointments are not otherwise provided for"; but where their appointment is otherwise provided for in the Constitution, that mode, whatever it may be, or by whatever electoral body, is as valid as any other expressly prescribed in that instrument. So after all, the single inquiry is, What is the proper construction of this amendment of the Constitution in relation to the University, uncontrolled by sec. 10 or any other provision of the Constitution? For it will
(84) not do to say that sec. 10 controls the amendment and not the amendment controls sec. 10. The principles of construction make sec. 10 subservient to the amendment, if there is an irreconcilable conflict between them. Even where the entire instrument was formed at the same instant of time,

the rule is "that if two provisions of the written Constitution are irreconcilably repugnant, that which is last in point of time and local position is to be preferred." Cooley, 58, note.

If, therefore, there was a real and irreconcilable conflict between the amendment and sec. 10, or any other part of the Constitution, as, for example, if the amendment had provided, expressly, that "the Legislature shall elect trustees of the University," by every rule of construction that provision would control all others, as to that particular class of officers; but it would at the same time leave the prohibitory clause of sec. 10 in full force in all other cases. If this is not the rule, it would follow that an amendment engrafted upon the Constitution, although expressly intended to make a change, would fail if it conflicted with any part of the very instrument it was intended to alter. But there is no conflict between sec. 10 and the amendment, as effect may be given to both provisions; for the amendment merely qualifies the other provisions of the Constitution by giving the election of these trustees only to the Legislature, leaving the prohibition in sec. 10 to operate in all the cases therein provided for. To illustrate: Almost every act of incorporation either repeals or suspends some part of the general law of the land, yet the law is not the less operative in all other cases. So also, the amendment is not unlike an exception in a grant.

But it is objected that the amendment only conferred upon the Legislature the power to delegate, and not to exercise, the elective franchise, and therefore that the election by that body was void. In reply to this it may be affirmed, if not as an axiom, yet as a safe proposition, that where a body has the power of delegating an authority, without limitation or restrictions, there it has itself the power of doing the thing delegated. It may perform any act it can (85) authorize another to do, upon the principle that the less is included in the greater. *Rice v. Packman,* 16 Mass., 326; Cooley, 100.

But it is again objected that in electing the trustees the Legislature usurped an executive power, which is forbidden by the theory, if not the words, of the Constitution. Now the election of officers is not an executive, legislative or judicial power, but only a mode of filling the offices created by law, whether they belong to one department or the other. The

election of a judge is not a judicial power, nor the election of a governor an executive power; for if so, all elections by the people would be an infringement upon the executive department. The true test is, Where does the Constitution lodge the power of electing the various public agents of the government? and it is conclusive upon the judicial mind, whether this power is found to be lodged in the one or the other branch, or concurrently in all these departments into which the supreme authority of the State is divided.

The purpose of the Constitution was that there should be trustees of the University, and that they should be elected by the Board of Education. The purpose of the amendment is that they shall no longer be elected by the Board of Education, but in such way as the Legislature may provide, and to that end unlimited power is vested in that body as to the number of trustees and the mode of election, leaving both to the wisdom and discretion of the Legislature. This view is the more apparent when we compare the amendment with other parts of the Constitution. For example, sec. 1, Art. III, provides that the Governor, etc., shall be elected for a term of four years "by the qualified electors of the State." Sec. 21, Art. IV, provides that a Clerk of the Superior Court of each county "shall be elected by the qualified voters thereof." Sec. 26, Art. IV, provides that the Justices of the Supreme and Superior Courts "shall be elected by the qualified voters of the State," and so in regard to all the other officers of the State. Wherever a particular mode of election was
(86) intended, it was plainly and in direct terms, as in these examples, provided in the Constitution. If, therefore, this amendment had intended any one mode of election, it would have so declared in the like express terms. As it did not so declare, who is to decide but the legislative body upon which the whole power is conferred?

The Constitution provides but two modes of election for all public officers, one by the people and the other by the Legislature. It certainly was not intended that the people should elect the trustees of the University. A proposition to elect sixty-four trustees by the people at large would be absurd. It would be more reasonable thus to elect directors of railroads, and of the penal and charitable institutions of the State. The

only other mode of election is by the Legislature, or as it may, as in this case, prescribe. The amendment opened two courses to that body, either to devolve the election on some other body, selected for the purpose, or to exercise the power itself. It wisely chose the latter course. A constitutional body of gentlemen, from every county in the State, chosen by the people for their supposed fitness, assembled together for deliberation and the enactment of laws for the public welfare, is the most eminently fit to choose as trustees those who are worthy and disposed to discharge the gratuitous duties of the office.

The Constitution of the United States has a provision very similar to the amendment we are now considering. Art. II, sec. 2, provides that "each State shall appoint, in such manner as the Legislature thereof may direct, electors," etc. The construction of this clause of the Federal Constitution has been that it confers upon the Legislature the power to elect or to refer the election to the people. Commenting upon this provision of the Federal Constitution, Curtis uses this language: "In this place it was proposed that each State should appoint, in such manner as the Legislature might direct, a number of electors equal to the whole number of Senators and Representatives in Congress to which the State might be entitled under the provisions of the Constitution already agreed upon. The advantages of this plan were that it (87) referred the mode of appointing the electors to the States themselves, so that they could adopt a popular election, or a election by the Legislature, as they might prefer." Hist. of the Const., Vol. II, 389. To the same effect is Story: "It is observable that the language of the Constitution is that each State shall appoint in such manner as the Legislature thereof may direct," the number of electors to which the State is entitled. Under this authority the appointment of electors has been variously provided by the State Legislatures. In some States the Legislatures have directly chosen their electors by themselves; in others they have been chosen by the people by a general ticket, through the whole State; and in others by the people in electoral districts fixed by the Legislature, a certain number of electors being appointed to each district. No question has ever arisen as to the constitutionality of either mode, except that of a direct choice to the Legislature.

"But this, though often doubted by able and ingenious minds, has been firmly established in practice ever since the adoption of the Constitution, and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it. At present, in nearly all the States, the electors are chosen either by the people by a general ticket, or by the State Legislature." Com. on Const., Vol. III, sec. 1466. So that although there has been some diversity of opinion, the construction of this provision of the Constitution has been finally settled in favor of the legislative power.

We conclude, therefore, both from reason and authority, that the Legislature in electing trustees of the University, only exercised a power conferred upon them by the Constitution.

PEARSON, C. J. I was not in attendance, owing to sickness, when the Associate Justices at the last term of the Court had this case under consideration.

They inform me there was no difference of opinion upon the question as to the ratification by the people at the elec-
(88) tion in August, 1873, of all of the amendments to the Constitution which were submitted to a vote, and the Associate Justices concurred in the conclusion that the amendments were duly adopted and form a part of the Constitution. I concur in this opinion.

The Associate Justices further inform me there was a difference of opinion on the question as to the constitutionality of the act which provides, "The General Assembly shall elect the trustees of the University"; an *advisari* was taken for the purpose of enabling me to take part in the decision of that question.

The amendment under consideration strikes out secs. 5, 13, 14 and 15 of Art. IX, "Education," and enacts, "The General Assembly shall have power to provide for the election of trustees of the University of North Carolina."

It is said this general power is restricted by a prohibition in sec. 5, Art. III, "Executive Department." "And no such officer shall be appointed or elected by the General Assembly." No reference to this prohibition is made in the amendment, and the argument is: The original Constitution and the amendment are to be construed together. The amendment

is to be considered as if it had been inserted in the original Constitution. An express prohibition cannot be made to yield to an inference drawn from the general words used in conferring the power. Therefore, the General Assembly has power to provide for the election of trustees, in any other mode, save that of an election by the members of its own body.

This conclusion follows, provided the premises be admitted: Is the proposition true, an amendment to the Constitution is to be considered as if it had been in the original instrument?

In support of this proposition reliance is put upon the analogy of a settled rule of construction in regard to amendments of pleadings, both in courts of law and of equity; but in my opinion this is not in point. A party cannot amend his pleading without obtaining the leave of the Court; in order to prevent the party from having benefit by his omission to insert the matter in the original pleadings, the leave of the Court is given on the condition that the amend- (89) ment shall be considered *as if* it had been inserted in the first instance. The people, voting in accordance to the provisions of the Constitution, have power—without asking the leave of anybody—to make, amend, alter or modify the Constitution at any time and to any extent a majority may see fit. There is no occasion for any condition or for a resort to legal fiction, but in putting a construction upon the amendment the Court is to take the fact as it is: the amendment was made *after* the adoption of the Constitution, and is bound to give full effect to the amendment, as the last expression of the will of the people; true, the Constitution and the amendment are to be construed together, but the object is to see how far the original Constitution must yield in order to give full effect to the amendment. As the power conferred upon the General Assembly is without any restriction, full effect cannot be given to the amendment without making the prohibition contained in the original instrument yield to the extent of allowing an exception in respect to the appointment or election of trustees of the University.

The rules adopted by the courts for the construction of codicils furnish a more apt analogy and are doubly in point. The testator, observing the formula required by law, can revoke, amend, alter or modify his will, at any time and to such

extent as he is minded; the courts look upon the codicil as the last expression of his will, and give full effect to it by making "the will" yield as far as is necessary for that purpose. The fiction that the codicil must be considered *as if* it had been inserted in the will is not resorted to, and the courts give full weight to the fact that the codicil was made *after* the will, and the extent to which the intention of the testator had been changed is judged of by the words of the codicil, giving effect to the will and construing it with the codicil only so far as the will can be allowed to operate without detracting from the effect of the codicil.

So, in reference to the General Assembly, that body has power to repeal or amend any prior statute. An
(90) amendatory statute is construed with reference to the fact that it was enacted *after* the original statute, and the portion of the second statute being considered as if it had been inserted in the first, never has been suggested.

So, in reference to deeds; the party to a deed may rescind or alter it by the execution of a second deed. There is no necessity for the leave of any one to enable them to do so, and the courts give full effect to the last deed, as expressing the intention of the parties, the first deed being referred to only for the purpose of seeing how far he must yield in order to give full effect to the last.

Thus, it is seen that in construing codicils, amendments to Constitution, amendments of statutes, and the alteration of deeds, the courts give weight to the fact that the one is made *after* the other, and the *fiction* that an amendment to pleading is to be considered *as if* it had been inserted in the first instance, stands isolated, and is confined to the case of an amendment to pleading, because of the special ground on which it rests.

The mode of electing trustees by "the Board of Education" had not been attended with a favorable result; under the old mode of electing trustees "by the members of the General Assembly," the institution had flourished until blighted by the desolation of war; so, when the former was discarded by the amendment and struck out of the Constitution, it was naturally to be expected that the old mode would be again adopted. These are parts of history, to be taken into consid-

eration as bearing upon the construction of the amendment, and seem to me to be conclusive.

Had the amendment provided: "The trustees shall be elected by the members of the General Assembly," so as to adopt the old mode, in so many words, it would have had the advantage of being direct and free from all room for construction, but it would have been exposed to one objection urged against the mode adopted in the Constitution, which the amendment strikes out, to-wit: there could be no change in the mode without delay and expense inci- (91) dent to all changes of the fundamental law; whereas, by conferring an unrestricted power upon the General Assembly, that body could adopt the old mode, or some other, and if the mode adopted in the first instance proved unsuccessful, set aside and substitute another by ordinary legislation; for instance, if the General Assembly adopted the old mode, and that, under the new conditions resulting from the war, did not prove a success, then another mode—an election by the alumni of the University—could be tried, or any other which might, in the wisdom of the General Assembly, be deemed expedient.

The objection that under the power to provide for the election of trustees, conferred upon the General Assembly, that body could not provide for an election by its own members, besides being met by reference to the past history of the University, is opposed by the analogy of the law. It is settled: a will of property to A to do with as he pleases confers absolute ownership. If an unrestricted power of appointment be given, it confers the ownership, for, if the party to whom the power is given does not exercise it, the presumption is that he makes an appointment to himself. This inference of the law is based on a knowledge of human nature, and the effect of self-interest, which is presumed to prevail among corporate bodies, whether political or merely civil, as well as among individuals; and with deference to the opinion of others, my conviction is, according to the principles of human nature and the analogies of the law, based upon them: in granting this unmistakable power to the General Assembly, it was not only expected, but it was the intention of the amendment, that the General Assembly should adopt the old mode of elec-

tion, and should that not answer, then that body has power to substitute another.

PER CURIAM. Judgment reversed, and judgment for the plaintiffs upon the demurrer.

Cited: Cunningham v. Sprinkle, 124 N. C., 642; *Cherry v. Burns, Id.,* 765.

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(92)

O. SPRINKLE and wife v. JOHN W. MARTIN.

1. A debtor owing two or more debts to the same creditor and making a payment, may at the time direct the application thereof.

2. If he does not direct the application, the creditor may do so.

3. If neither at the time directs the application thereof, the law will apply it to that debt for which the creditor's security is most precarious.

(*Moss v. Adams,* 39 N. C., 42; *Ramseur v. Thomas,* 32 N. C., 165; *State v. Thomas,* 33 N. C., 251; *Jenkins v. Beal,* 70 N. C., 440, cited and approved).

ACTION against the defendant as surety on a guardian bond, heard before *Cloud, J.,* at August (Special) Term, 1874, of WILKES.

The defendant was surety for one Benjamin P. Martin, who was the guardian of the *feme* plaintiff, his daughter. The plaintiffs had heretofore recovered from the guardian a large amount, which he had received during her minority, from the estate of her grandfather, one Isaac Martin; the remainder of the judgment being for effects which came into the possession of the guardian from the estate of her uncle, one N. G. Martin; this latter amount came into the guardian's hands after the *feme* plaintiff became of age, and was not secured by the guardian bond.

On the trial in the Superior Court, at Spring Term, 1874, it was agreed as to the amount of effects which the guardian had received from the estate of her grandfather and which was covered by the guardian bond, and the only contest then arising was as to the application of $196.47, received by the plaintiffs under the following circumstances:

After the commencement of this action the plaintiffs, by supplemental proceedings, under sec. —, C. C. P., had recovered the said sum of $196.47 from one Shuford, who owed the same to the said guardian, by note given for the purchase of a slave which had come into the possession of the guardian from the estate of the said Isaac Martin, and which slave belonged to the *feme* plaintiff and her mother and sisters—all wards of said guardian—and for whom there was but (93) one bond, which was intended to cover their whole estate. This slave had been sold during the minority of said wards, and without any order of Court.

It was admitted that B. P. Martin, the guardian, was totally insolvent. The defendant insisted that the money collected from Shuford should be applied as a credit on the amount covered by the guardian bond in exoneration of him *pro tanto*. On the other hand, the plaintiffs contended that the money thus collected should be applied as a credit on the sum due from the guardian, and which was unsecured, not being covered by the guardian bond.

His Honor being of opinion with the plaintiff, gave judgment accordingly. From this judgment the defendant appealed.

Folk & Armfield, for appellant.
Furches, contra.

READE, J. This is the fifth case at least, in our own Reports, in which it is decided: 1. That a debtor owing two or more debts to the same creditor, and making a payment, may at the time direct the application of it.

2. If the debtor does not direct the application at the time, the creditor may make it.

3. If neither debtor nor creditor makes it, then the law will apply it to that debt for which the creditor's security is most precarious.

Moss v. Adams, 39 N. C., 42; *Ramseur v. Thomas,* 32 N. C., 165; *State v. Thomas,* 33 N. C., 251; *Jenkins v. Beal,* 70 N. C., 440.

PER CURIAM. No error.

Cited: Wittkowski v. Reid, 84 N. C., 23; *Long v. Miller,* 93 N. C., 235; *Lester v. Houston,* 101 N. C., 609; *Young v. Alford,* 118 N. C., 220.

(94)

DOE on demise of CATHERINE WRIGHT v. THOMAS PLAYER.

Where an infant *feme covert* acknowledged the execution of a deed, and her privy examination was taken before a Judge of the Superior Court: *Held*, that the deed was then a conveyance of record, and could not be collaterally impeached in an action of ejectment.

(*Woodbourne v. Gorrell*, 66 N. C., 82, cited and approved).

EJECTMENT, commenced before the adoption of the C. C. P., tried before *Cloud, J.*, at the December (Special) Term, 1873, of NEW HANOVER.

On the trial below it was admitted that the land in dispute was the property of the lessee of the plaintiff, being land owned by her at the time of her marriage with James Wright, and that he, her said husband, died before the commencement of this action.

On the — day of January, 1853, James Wright and Catherine, his wife, the lessor of the plaintiff, made a deed of conveyance of the land in dispute to McMillan and Davis, which deed was duly acknowledged and the privy examination of the wife taken before his Honor, *John M. Dick*, then one of the Judges of the Superior Courts, and the deed was duly registered.

On 5 December, 1853, McMillan and Davis sold and conveyed the land to the defendant by deed duly proved and registered.

The plaintiff offered to prove that at the time of the execution by her of the deed for the land to McMillan and Davis, and at the same time of her private examination before *Judge Dick*, she was an infant. And for the purpose of showing that she had never ratified the sale of said land, the plaintiff offered to prove further that several years after the acknowledgment by her of the execution of the deed, and in the lifetime of her husband, in disaffirmance of her contract of sale, she took possession of said land, claiming it as her own; and continued in possession until she was ejected by the
(95) defendant, on certain proceedings before a justice of the peace, and that very soon after his death she commenced this action.

His Honor rejected all this testimony, upon the grounds that the probate of the deed to McMillan and Davis, offered in evidence, was conclusive; and that the plaintiff could not be heard to say that she was under the disability of infancy at the time she acknowledged the execution of the same before *Judge Dick.*

In submission to this opinion of his Honor, the plaintiff submitted to a nonsuit and appealed.

Strange and *Battle & Son,* for appellant.
Smith & Strong, contra.

BYNUM, J. Upon the trial, in the leading case of *Woodbourne v. Gorrell,* 66 N. C., 82, the plaintiff offered to prove that at the time of her privy examination she was *non compos mentis,* and the deed was on that account void. In the case now before us the plaintiff offered to prove on the trial that she was an infant at the time she acknowledged the deed and was privily examined. In the former case this Court held: 1. That the acknowledgment and privy examination, taken before a Judge, by our statute has the effect of a fine and recovery; 2. That a fine or recovery is a matter of record in England, done before the Chief Justices of the Court of Common Pleas in open Court, and that the verity of such record cannot be impeached.

In delivering the opinion of the Court the Chief Justice says: "I am not able to see how the proceeding, if done before a Judge or the County Court, could be vacated by the wife, if in point of fact the examination was not separate and apart from her husband and she was subject to the influence of his presence, or if in point of fact she was not of sound mind and could not voluntarily assent thereto. Possibly, where the examination is by commission, the wife might maintain a bill in equity to cancel the deed on the ground of fraud and a false certificate by the commissioner, but it is perfectly certain that this assurance of title and (96) conveyance of record cannot be impeached collaterally in an action for the land, as the plaintiff offered to do in this case."

It is clear that *Woodbourne's case* is decisive of this, unless the effect of a fine or recovery upon the rights of an infant can be distinguished from the effect upon the rights of a person *non compos mentis.* Admitting the force of this, the counsel of the plaintiff have assumed that task and filed a learned and able brief to show the difference between the two cases.

Woodbourne's case was put upon the ground that when the Revised Statutes, ch. 37, sec. 9, enacted that "All conveyances, etc., acknowledged, etc., shall be as valid in law to convey all the estate of the wife in such lands, etc., as if done by fine and recovery or any other means whatever," all conveyances so made must have the effect declared in the statute, and no other, and that the effect of a fine or recovery is to constitute a conveyance of record.

The counsel admit that a fine is a conveyance of record, and therefore cannot be impeached collaterally, even though the Judge certifies to the privy examination of a person *non compos mentis,* but contend that the levying a fine by an infant can be thus impeached, upon the ground that the Court had no jurisdiction to take the privy examination of an infant. No authority is cited in support of the position that the Court has less jurisdiction in one case than the other, and that its act in the case of a person *non compos mentis* has the force and effect of a record, which cannot be impeached, while in the case of an infant it has no such effect and can be impeached. Nor does reason support the position, as the supposed hardship in the case of an infant is no greater than in that of the lunatic.

It is true that the Court ought not to admit the acknowledgment of one under the disability of nonage, or lunacy, yet having once recorded their agreement as the judgment of the Court, it is a judicial act, done by an infant in a court of record, and forever binds him and his representatives,
(97) unless he reverses it by a writ of error, which must be brought by him during his minority, that the Court, by inspection, may determine his age. Co. Lit., 380; 2 Inst., 483; 12 Co., 122; Bac. Infancy, tit. I. So, if an infant levies a fine, he is enabled, by law, to declare the uses thereof, and if he reverse not the fine during his nonage the declaration of uses will stand forever; for though that (the

declaration of uses) be a matter *in pais,* and all such acts *in pais* an infant may avoid at any time after his full age, if he do not consent, yet being made in pursuance of the fine levied, which fine must stand good forever, unless reversed during infancy, so will the declaration of uses also. Co., 58; 10 Co., 42; Moore, 22. And the reason why these conveyances by fine and recovery must be avoided during infancy is because, being entered into, under the personal inspection of the Judge, who is supposed to do right, the infant cannot, against them, aver his disability, but must reverse them by a judgment of the Superior Court, which, by inspection, has the same means to determine what is right as the Court which received the contract. Bac. Abr., tit. "Infancy," 125; Moore Pl., 202; 2 Inst., 483; Co. Lit., 380.

The distinction is between matters of record and matters *in pais;* the latter may be avoided either within age or at full age, but matters of record, as statutes Merchants, and of the Staple, fines and recoveries, must be avoided during minority; for, being judicial acts, taken by a court or Judge, the nonage of the party is to be tried by inspection, and not by the country, and must be dissolved *eo ligamine quo ligatur,* for judgments are not to be subverted by matter *in pais,* without matter of record. Roll. Abr., 742.

For example, if an infant bargain and sell his land by deed indented and enrolled, yet he may plead his nonage, for, notwithstanding the Statute 27 Hen. VIII., ch. 16, makes the enrollment necessary to complete the conveyance, yet the bargainee claims by the deed as at common law, which is a matter *in pais,* and therefore defeasible by proof of nonage at any time. 2 Inst., 673. So it is said that (98) if an infant appear by attorney and suffer a recovery, it may for this error be reversed after the infant comes of age, because it shall be tried by the country whether the warrant of attorney was made when under age or not. But when the fine or recovery is made in person, then the Judge acts on inspection, and his judicial act, becoming a record, can be reversed only by the same solemnity with which it was done.

It is needless to pursue the matter farther, for it seems clear that if this conveyance had been by fine or recovery at common law, it could not have been reversed except by writ of

error, and that during the minority of the infant. This being so, the only difficulty is removed, for the statute here steps in and enacts that all deeds executed as this was "shall have the force and effect of a fine and recovery."

It is no answer to say that in our State these conveyances, by the acknowledgment and privy examination of a *feme covert,* are not matters of record, and therefore, no writ of error lying for them to reverse them, the party is without remedy, unless they can be impeached by matter *in pais.* The law is so written, and the hardship, if there be any, must be directed to another tribunal. But the hardship is more seeming than real, and is incident in many forms of estoppel, by record and otherwise. The salutary effect of preserving the solemnity and conclusiveness of judicial acts and records inviolate more than compensates for an occasional hardship in practice.

The same hardship existed in the conveyance by fine and recovery, for the remedy of an infant *feme covert* only lay when she could seldom claim it, to-wit, during nonage, and she was under the constraint of her husband.

In our case the deed was executed in 1853, and its effect is governed by Revised Statutes, ch. 37, sec. 9. It is observable that the Rev. Code, ch. 37, sec. 8, enacted in 1856, and now the law, omits the words, "as if done by fine or recovery, or in any other ways and means whatever." How this
(99) change will affect conveyances made subsequent thereto, we are not now called upon to decide.

PER CURIAM. Judgment affirmed.

Cited: Jones v. Cohen, 82 N. C., 78; *Kidd v. Venable,* 111 N. C., 540.

STATE v. WARREN CARTER.

Upon an indictment for larceny and receiving stolen treasury-notes: *Held*, that it was error to admit evidence showing, "that shortly after the alleged stealing, the defendant purchased several articles at a store, and that witness saw a number of bills in the pocket-book of the defendant, of what denomination he was ignorant."

(*Matthis v. Matthis*, 48 N. C., 182; *Cobb v. Fogleman*, 52 N. C., 440; *State v. Allen*, 48 N. C., 257; *Pollok v. Pollok*, 68 N. C., 46, cited and approved).

INDICTMENT for larceny and receiving stolen goods, tried before *Cloud, J.*, at the Spring Term, 1874, of DAVIE.

The defendant was tried upon an indictment containing two counts: one for stealing certain United States Treasury-notes and fractional currency notes, the property of the prosecutor, one Lemon Shell; and the other for receiving the same, knowing the notes, etc., to have been stolen.

On the trial the State proved by one Mary March, a colored woman, that she herself stole the money from the prosecutor, with whom she was living, acting under the persuasion of the defendant, with whom it appeared she was improperly cohabiting, and that she gave the defendant most of it.

It seems that her examination at the time of her arrest was taken down in writing, and some question arose as to the necessity of introducing such written examination to corroborate the statement she made on the trial. The de-
cision of his Honor, objected to by the prisoner, in (100)
relation to the matter, need not be stated, as the case
went off in this Court upon another point in no way connected with it.

The Solicitor, with other witnesses, introduced one William Bailey, who proved that the defendant, a short time after the larceny was committed, came to his store and purchased several articles; and that when the defendant went to pay for the same he, the witness, saw several bills of money in his pocket-book, but that he did not notice the denomination of them. This evidence was objected to by the defendant, but was received by the Court, whereupon the defendant excepted.

Under the instructions of his Honor the jury returned a general verdict of "Guilty." Motion for a new trial; motion overruled. Judgment, and appeal by defendant.

McCorkle & Bailey, for defendant.
Attorney-General Hargrove, for the State.

BYNUM, J. The count in the indictment against the prisoner relied upon by the State is that which charges him as the receiver of stolen property, knowing it to have been stolen, to-wit: A specified number of United States notes of five dollars each, of one dollar each, and of fifty cents each. In support of the charge, among other things, the State offered to prove by one William Bailey that "a short time after the larceny the prisoner came to his store and purchased several articles, and he saw several bills of money in his pocket-book when the prisoner went to pay him, but did not notice the denomination of them." This testimony was objected to by the prisoner, but admitted by the Court. Was this error?

The rule of evidence as to its admissibility is that "testimony which raises a mere conjecture ought not to be left to a jury as evidence of a fact which a party is required to prove." *Matthis v. Matthis,* 48 N. C., 132; *Cobb v. Fogleman,* 23 N. C., 440; *State v. Allen,* 48 N. C., 257. The State here was required to prove that the prisoner received
(101) the stolen "treasury-notes" described in the indictment. The evidence admitted to establish this fact was that the prisoner was seen in a store, a short time after the larceny—whether a day, a week, or a month after, is not stated—and that he purchased several articles and had some "bills of money," neither the amount nor denomination of which was seen. Was the sum of money seen with the prisoner unusual in amount? Was any of it of the denomination of that which was stolen? Was there any incident connected with the store transaction calculated to raise even a suspicion against him? A man is seen in a store, having some money and making some, we are to assume, ordinary purchases in the usual course of business. The circumstance of his having some money was one common to all persons who use a circulating medium, and was unaccompanied by a single mark or incident which distinguished his possession from that of others of a similar sum of money. If the prisoner had been indicted for stealing wearing apparel, it would have been just as competent for the State to prove that a short time after the larceny the prisoner was seen dressed in a suit of

clothes. The evidence admitted not only does not tend to establish the fact to be proved, but does not afford a rational ground of conjecture of his guilt. What effect this testimony had upon the jury, if any, we have no means of knowing. But as it may have misled them to the prejudice of the prisoner, and was improperly admitted, there must be a *venire de novo.* It is unnecessary to, and we do not, decide the other exceptions; but Starkie on Evidence, 335, and *Pollok v. Pollok,* 68 N. C., 46, seem to hold that where the contents of a writing come collaterally in question only and are not material to the issue, such writing need not be produced, but parol evidence of its contents may be given.

PER CURIAM. *Venire de novo.*

Cited: Carrington v. Allen, 87 N. C., 356; *Faulcon v. Johnston,* 102 N. C., 268.

(102)

THOMAS W. SUTTON v. JOHN L. MCMILLAN.

1. It is error for a Judge in the Superior Court to set aside a judgment on the motion of the defendant, without giving the plaintiff the legal notice.

2. Several causes of action may be joined in one complaint, *provided* all of them arise out of any one of the classes specified in the C. C. P., *e. g.*, "(2) contracts expressed or implied."

(*Seymour v. Cohen,* 67 N. C., 345, cited and approved).

MOTION by the defendant, upon affidavit, to set aside a judgment obtained by the plaintiff, heard by *Russell, J.,* at chambers, in BLADEN, 27 April, 1874.

The following are substantially the agreed facts, signed by counsel and transmitted to this Court as a "statement of the case":

1. The judgment was rendered at Spring Term, 1874, of Bladen Superior Court for the sum of $359.11. A part of this judgment was rendered upon a note under seal, given by the defendant to the plaintiff for the sum of $124.76, with interest from 8 December, 1871, on $113.50; the balance of the judgment was rendered on an open account, due by the defendant to the plaintiff.

2. The plaintiff's complaint filed and sworn to at said Spring Term, 1874, demanded judgment for the sum of $479.11, with interest on $113.50 from 8 December, 1871, and for costs.

3. The defendant failing to file an answer, and no attorney's name being marked, the plaintiff, on the last day of the Court had the defendant called; and thereupon the plaintiff moved for and obtained judgment by default for the sum of $359.11.

4. That Edwin W. Kerr, Esq., an attorney at law and partner of A. A. McKay, Esq., was in attendance upon the Court during the whole term, but was unknown to the defendant as the law partner of Mr. McKay, or as an attorney or otherwise. And likewise the defendant was in
(103) Court, in person, several times during the term at which the said judgment was rendered.

5. On 27 April, 1874, before *Russell, Judge,* etc., the defendant moved for and obtained an order to set aside the judgment in said action. No notice of said motion was ever given to the plaintiff; and he did not know that such an order had been made until 26 September thereafter, when the order was shown to him by the Clerk of the Court, at which time he craved an appeal to the Supreme Court.

Sutton and *W. McL. McKay,* for appellant.
E. W. Kerr, contra.

SETTLE, J. A judgment having been rendered at the regular Spring Term, 1874, of Bladen Superior Court, in favor of the plaintiff, the defendant moved for and obtained an order from his Honor, at chambers, to set aside the judgment.

Whatever merits the defendant's affidavit, upon which he based his motion, may disclose, either as to the absence of his counsel or otherwise, yet no notice of said motion was ever given to the plaintiff, and he did not know that such an order had been made, until some time thereafter, when he craved an appeal to this Court.

We have held in such cases that notice is necessary, and to grant the order without it is error. *Seymour v. Cohen,* 67 N. C., 345.

This is decisive of the case before us, but as there are three appeals now pending involving very much the same questions, and as it may be more satisfactory to the parties, we will notice the objections which are now urged against the plaintiff's judgment.

I. It is contended that as the plaintiff's claim consisted of a note of hand for $124.76 and an open account of $234.35, he could not unite in the same complaint "the two causes of action, because they are not the same trans- (104) action" in contemplation of the C. C. P., sec. 126.

This is a misapprehension of The Code, for it is clear that you may join several causes of action, provided they all arise out of any one of the seven classes specified in The Code, *e. g.*, "(2) contracts express or implied," which is our case.

II. This being so, there is no force in the other suggestion that the Superior Court had no original jurisdiction over the amount of said note and could not consolidate the same with an open account, thereby making a sum of which the Court could take jurisdiction.

III. There is objection to the manner in which the amount of the judgment was ascertained.

The defendant having failed to file an answer, and no attorney's name being marked on the docket, the plaintiff on the last day of the term had the defendant called, and took judgment by default, and had the Clerk to ascertain the amount which he was entitled to recover, by his own examination under oath, in pursuance of sec. 217, C. C. P.

IV. The defendant contends that The Code, having been suspended by the Act of 1870-'71, ch. 42, making summonses returnable to the Court in term, and not before the Clerk, the Court could not, after a judgment by default on the open account, ascertain the amount due thereon without the intervention of a jury.

While the act cited does suspend The Code, so far as the return of summonses is concerned, yet it provides that "the defendant shall appear and demur, plead or answer at the same term to which the summons shall be returnable, otherwise the plaintiff may have judgment by default *as is now allowed by law.*" The question is, How are our judgments by default now allowed by law, and the amounts thereof as-

certained? Is it in the manner prescribed in the said sec. 217, C. C. P., which certainly was the law at the time, or is it by the old mode of a jury and a writ of inquiry? For money demands, at least, we are inclined to think (105) that the C. C. P. may be followed.

But we express no positive opinion on the question at present, as it is not necessary to do so for the decision of this case; and it is a good rule not to decide questions until they are fairly presented for decision. I have only stated the question to show that we have not overlooked it.

PER CURIAM. Judgment reversed.

Cited: Blue v. McMillan, post, 105; *Lyon v. McMillan, Id.,* 393; *Wynne v. Prairie,* 86 N. C., 77; *Moore v. Nowell,* 94 N. C., 272; *Fisher v. Mining Co.,* 105 N. C., 126.

JOHN G. BLUE, admr. of JOHN A. RICHARDSON, v. JOHN L. MCMILLAN.

(For the syllabus in this case see the preceding case of *Sutton v. McMillan,* page 102).

MOTION by the defendant to set aside a judgment, heard by *Russell, J.,* at chambers, in BLADEN.

From the order made by his Honor, the plaintiff appealed. The facts of the case, and the points raised and decided in the Court below and in this Court, are identically the same as are those in the case preceding.

R. H. & C. C. Lyon, for appellant.
Kerr, contra.

SETTLE, J. The question presented by this record is decided in *Sutton v. McMillan, ante,* 102.

PER CURIAM. Judgment reversed.

(106)

JEMIMA BRANCH, ex-parte.

Where A conveyed a certain tract of land known as his "home place, except so much thereof as may be laid off and assigned as a homestead under the act of Assembly; and which is expressly excepted from this conveyance": *Held*, that the exception is operative and should be allowed to have effect.

(*Massey v. Warren*, 52 N. C., 143, cited and approved).

SPECIAL PROCEEDING, being a petition for a homestead, originally commenced in a Justice's Court and carried from thence to the Superior Court of DUPLIN, where it was tried at Spring Term, 1874, before *Russell, J.*

The following facts were agreed and sent to this Court as one of the papers making up the transcript.

The plaintiff in the petition is the widow of one J. G. Branch, deceased in 1872, first making and publishing a will, from which his widow duly dissented. She filed her petition before a justice, praying that a homestead in certain lands belonging to the estate of her deceased husband might be allotted to her. His creditors—and his estate was much indebted—caused themselves to be made parties defendant to the proceedings in the Justice's Court, and from the judgment therein rendered in favor of the plaintiff, appealed to the Superior Court.

On the trial in the Superior Court it appeared that James G. Branch, the husband of the plaintiff, acquired the lands described in her petition, and also intermarried with the plaintiff, prior to the Act of 1867, restoring common-law right of dower to married women, and before the adoption of our present Constitution; and that during his life he conveyed the land, from which the plaintiff asks her homestead may be allotted, to one E. H. Keathly *in trust* for the benefit of certain creditors, the defendants above named, in which deed occurs the following clause: "Except so much thereof as may be laid off and assigned as a homestead under the act of Assembly, and which is expressly excepted (107) from this conveyance." No homestead was laid off prior to said conveyance, nor since. Nor had she petitioned for dower.

His Honor, being of opinion that the prayer of the plaintiff in her petition was properly granted by the Justice upon his hearing the cause, affirmed his judgment, remanding the case to the Justice's Court to be proceeded with according to law. From this judgment the creditors, who had been made defendants, appealed.

Kornegay, for appellants.
(109) *Stallings, contra.*

PEARSON, C. J. The case depends upon a single question. On 7 November, 1872, James G. Branch executed a deed by which he conveyed to the defendant Keathly, *in trust* for certain creditors, a tract of land known as his "home place, *except so much thereof as may be laid off and assigned as a homestead under the act of Assembly, and which is expressly excepted from this conveyance.*" Is this exception void because of vagueness and uncertainty?

We concur with his Honor in the opinion that the exception is operative, and should be allowed to have effect by an order to lay off and assign the homestead to which James G. Branch was entitled under the statute to which reference is made. "That is certain which can be made certain."

This exception refers expressly to the act of Assembly by which provision is made for laying off and assigning homesteads, and the part so to be laid off is excepted from the operation of the deed. Notwithstanding the ingenious and learned argument of the counsel for the defendants, we do not think that the question calls for discussion. The cases referred to, in regard to certainty of description in deeds, exceptions and contracts, settle the rule that the subject must be so described as to make it capable of being identified; and
(110) the purpose of this proceeding is to have the subject of the exception identified in the manner provided for by the statute. The only case cited which seems to bear upon the position contended for is *Massey v. Warren,* 52 N. C., 143. In that case the contest was between two sets of creditors in respect to such parts of the personal property as the law allowed poor debtors. The poor debtor had made no application to have the property allotted, and the allotment registered was not known in the proceeding and had

nothing to do with it; the decision turned on the construction of sec. 529 of the Revised Code, ch. 45. In our case the proceeding is instituted by the widow of the debtor; she stands in his shoes, and the very purpose of the proceeding is to have the homestead laid off and identified according to the statute, so as to have the subject fitted to the description set out in the deed made by the husband to the defendants, as being excepted from its operation, and without which exception the deed would not have been executed. It is with an ill grace that while taking the benefit of the deed the defendants seek to evade one of its express stipulations.

PER CURIAM. Judgment affirmed.

Cited: Littlejohn v. Egerton, 77 N. C., 381; *Smith v. McDonald,* 95 N. C., 166.

JESSE T. EATON v. S. A. KELLY and others.

A sheriff and his sureties are liable on his official bond, only for a breach of some duty specifically described therein.

(*Crumpler v. Governor,* 12 N. C., 52; *The Governor v. Mattock, Ibid.,* 214; *Jones v. Montford,* 20 N. C., 69; *Ellis v. Long,* 30 N. C., 513; *State v. Brown,* 33 N. C., 141; *Brooks v. Gibbs,* 47 N. C., 266; *Evans v. Blalock, Ibid.,* 377, cited and approved).

ACTION upon the official bond of a sheriff, submitted upon facts agreed to his Honor, *Cloud, J.,* at Fall Term, 1874, of DAVIE. (111)

The facts pertinent to the decision of this Court are substantially the following:

That the defendant Kelly was elected Sheriff of Davie County, in 1868, gave bond and duly qualified. That in 1870 one Martin was elected Sheriff and gave bond, but Kelly, claiming to hold over, ousted him from the office. On 12 October, 1870, Kelly renewed his bond (which should have been given on the first Monday of the preceding September), with the other defendants as sureties.

On 6 October, 1870, Kelly, as Sheriff, caused to be offered for sale at public auction at the court-house door in Mocks-

ville a certain tract of land situate in Davie County, of about 220 acres, as the property of one Daniel Etchison, and at the same time caused it to be announced that the same was sold by virtue of writs of execution against the property of the said Etchison, at which sale the plaintiffs became the last and highest bidder, giving therefor $399.25, which sum the plaintiff paid Kelly and took a sheriff's deed for the land, of date 7 October, 1870. Kelly, at the time, had no executions in his hands against Etchison, nor had he any authority whatever to sell the land.

Upon the foregoing facts his Honor, being of opinion that as Kelly did not receive the plaintiff's money by virtue of legal process commanding him to levy the same, etc., he was not officially responsible, gave judgment against the plaintiff. From this judgment the plaintiff appealed.

McCorkle & Bailey, for appellant.
Craige & Craige, contra.

RODMAN, J. The question is not whether the Sheriff is liable in damages for his false representation, but whether he and his sureties are liable on his official bond.

The condition of the bond is as follows: "If the Sheriff aforesaid shall, well and truly, faithfully account, (112) and make due return of all process and precepts to him directed, and pay and satisfy all fees and sums of money by him received or levied by virtue of any process into the proper office into which the same, by its tenor thereof, ought to be paid, or to the person or persons to whom the same shall be due, or their executors, administrators or attorneys, *and in all other things well and truly, faithfully execute the said office of Sheriff according to law, during his continuance therein,* the above obligation to be void; otherwise," etc. It cannot be contended that the breach complained of comes within the first clause of this condition, which is for the due return of process, and the payment of all moneys collected, to the proper parties. If the breach complained of is covered by the bond at all, it can be only by the broad, comprehensive and general clause, for "truly and faithfully, in all things, performing the duties of Sheriff."

There are many decisions on the effect of these words. It may now be considered as settled that they relate only to the true and faithful performance of the Sheriff's duty in the matters above separately mentioned; that is, in the return of process and the payment of money received by virtue of it, etc.

To give to these words the extended signification contended for on the part of the plaintiff would render unnecessary any other words than these, as comprehending every violation of official duty in the condition of the bond declared on; and would also render it superfluous for the Sheriff to give bond for the collection and proper payment of taxes, State or municipal.

Every duty of the Sheriff might be comprehended in these general words if they were not restricted by those which go before and designate the subject-matter to which these are to apply.

The same act which requires a sheriff to give a bond in the form of that complained on, requires him to give the other bonds for the collection and payment of the State and municipal taxes, which conclusively shows that the general words have not the sweeping effect contended for. (113)

The decisions to this effect are so numerous and uniform that I will refer particularly to a few only, and that very briefly, and merely cite the others.

In *Crumpler v. Governor,* 12 N. C., 52, the Sheriff had given four bonds, but the condition of no one of them expressly provided for the payment of the State taxes, the nonpayment of which was the breach alleged. All of them contained general words, "faithfully execute the office," etc. It was held that these words did not extend beyond the duties specially described and provided for in the preceding clause. *Henderson, J.,* dissented from the conclusion of the Court, but he concurred in this rule of construction, and states it with great clearness and force. *State v. Long,* 30 N. C., 415, was an action on a bond with a condition containing general words like these in the bond before us. In that case it was held that these words did not impose on the sureties an obligation that the Sheriff should commit no wrong by color of his office, nor do anything not authorized by law. It was also

said, as had been decided in *Governor v. Montford,* 23 N. C., 155, that previous to the Act of 1829, which made them so, the sureties were not liable for a default of the Sheriff in not returning or in making a false return to a writ. The following cases confirm this rule of construction: *Governor v. Mattock,* 12 N. C., 214; *Jones v. Montford,* 20 N. C., 69; *Ellis v. Long,* 30 N. C., 513; *State v. Brown,* 33 N. C., 141; *Brooks v. Gibbs,* 47 N. C., 326; *Evans v. Blalock, Id.,* 377.

Our opinion on this point makes it unnecessary to consider the other points made in this case, viz., whether the bond of a sheriff, given on 12 October, relates back to the first Monday in September, or to any other time. That question is new and important, but perhaps the General Assembly may so provide that we shall never be required to pass on it.

PER CURIAM. Judgment below affirmed.

Cited: Holt v. McLean, 75 N. C., 349; *Prince v. McNeill,* 77 N. C., 403; *s. c.,* 80 N. C., 268; *Wilmington v. Nutt,* 78 N. C., 180; *Scott v. Kenan,* 94 N. C., 303; *Speight v. Staton,* 104 N. C., 48; *Kivett v. Young,* 106 N. C., 569; *Daniel v. Grizzard,* 117 N. C., 107; *Commissioners v. Sutton,* 120 N. C., 301.

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(114)

STATE v. WILLIAM ALLEN.

An indictment charging that A, "one cow of the value of ten dollars of the goods," etc., "then and there being found, maliciously did pursue, with the intent unlawfully and wickedly to wound and kill, and did kill her," only charges an injury to personal property, and cannot be maintained.

INDICTMENT for pursuing and killing live-stock, tried before *Buxton, J.,* at Fall Term, 1874, of ANSON.

In the bill upon which the defendant was tried it was charged that he, "one cow of the value of ten dollars, of the goods and chattels of one Thomas Cassel, then and there being found, maliciously did pursue, with the intent unlawfully and wickedly to wound and kill said cow, and did kill her, contrary," etc.

The jury returned a verdict of "Guilty"; whereupon the defendant moved to arrest the judgment, upon the ground that the indictment was fatally defective.

His Honor, upon consideration, being of opinion that the indictment was insufficient, allowed the motion and arrested the judgment. From this judgment the State appealed.

Attorney-General Hargrove, with whom was *Pemberton,* for the State.

No counsel in this Court for defendant.

PEARSON, C. J. The indictment charges, "the defendant did maliciously pursue a cow, the property of one Thomas Cassel, with the intent unlawfully and wickedly to kill said cow, and did kill her."

There are no sufficient averments to make this act amount to malicious mischief, or to bring it within the operation of any statute. So it is merely an injury to personal property, to be redressed by a civil action for damages. The judgment of the Court below is affirmed. It may be that the effect of the homestead and personal property exemption will make it necessary to enlarge the list of misdemeanors (115) in order to give protection to the rights of persons and the rights of things which have heretofore been sufficiently guarded by civil action for damages. This is matter for the consideration of the legislative branch of the government: it is ours to declare the laws, not to make them.

PER CURIAM. Judgment affirmed.

Cited: S. v. Whitaker, 85 N. C., 569.

THOMAS D. WINCHESTER v. A. S. GADDY.

A purchaser of property exempt from execution under the Homestead Act, cannot be held liable as *executor de son tort;* and an assignment of such property by a debtor without valuable consideration is not therefore fraudulent.

ACTION against the defendant as executor *de son tort*, tried before *Buxton, J.,* at Spring Term, 1874, of UNION.

The plaintiff commenced his suit in a Justice's Court upon a note for $131.85, dated 5 January, 1859, and payable with

interest, which note was signed by Elizabeth Gaddy, now deceased. He recovered a judgment before the Justice and a jury, whereupon the defendant appealed to the Superior Court.

On the trial in the Court below it was conceded that the plaintiff was the owner of this note and that it was justly due, for value received, from Elizabeth Gaddy; that she died intestate in Union County, where she had lived, in November, 1871, and that no administration had ever been taken out on the estate she left.

The object of the present action is to charge the defendant as executor *de son tort* to the extent of the plaintiff's debt, upon the ground of his having appropriated prop-
(116) erty of the deceased to a value greater than the debt.

The defendant claimed that the deceased, who was his mother, was largely indebted to him, and that the year before she died she transferred to him all her property in settlement of the debt.

It was in evidence that the defendant was a young man, unmarried and lived with his mother and a single sister. On returning from the army in 1865 he took charge of the farm, managed everything, worked as a hand and supported the family, getting his own support, but no wages, his mother telling him to take his pay out of the crop, which, however, he did not do. He had some little means of his own, out of which he paid some of his mother's debts and loaned her some money. She was a widow and had a life estate in the plantation. In 1870, apprehending that she was about to be pressed upon some old *ante*-war debts, among them that due the plaintiff, she transferred all her personal property to the defendant, consisting of a mule, oxen and cart, cows, sheep, hogs, furniture, corn, wheat, cotton, etc., under the following arrangement, as she informed a witness: That she had sold all her property to Alfred, the defendant; that the property she had she did not consider would more than pay him for taking care of her and for the money she had borrowed of him and for that he had paid for her. That she could not live long, and she desired that her son should keep the property at the same place for her support while she lived; that she expected to be pushed for her old debts, among others by the plaintiff; that she could not pay her old debts and pay

Alfred and live, and that she felt it to be her duty to pay her son first, as he had been taking care of her; that she would try to pay her old debts afterwards if she could.

The following issues were framed under the direction of the Court and submitted to the jury, who found in response thereto: 1. That the transfer of her property by Elizabeth Gaddy to her son, the defendant, was fraudulent, and that the property was worth $440. 2. That Elizabeth Gaddy was indebted to her son at the time of her (117) death in the sum of $1,028. 3. And that he had paid her debts to the amount of $13.21.

Upon this finding of the jury, the plaintiff moved for judgment for the amount of his debt, insisting that by their verdict the jury had found that the defendant was executor *de son tort* of the estate of Elizabeth Gaddy, and as such had assets to an amount of $440.

The defendant opposed the motion upon the following grounds: 1. That his Honor had erred in charging the jury that the transfer was fraudulent as a matter of law. 2. That fraud, even if intended, could not have been committed against the estate of Elizabeth Gaddy, she being entitled under the Constitution and laws to a personal property exemption of the value of $500, whereas, the property transferred was only worth $440. 3. That the conveyance, if fraudulent, could only be attacked by the plaintiff after he had reduced the debt to judgment. 4. That according to the Rev. Code, ch. 46, sec. 41 (Bat. Rev., ch. 45, sec. 67), the defendant could only be chargeable as executor *de son tort* in respect to goods coming to his hands, the value whereof exceeded the indebtedness of the intestate to him; and inasmuch, by the verdict of a jury, it was established that the indebtedness of the intestate to him was largely in excess of the value of the property, that for these reasons he was entitled to be discharged from any liability to the plaintiff.

His Honor, upon consideration after argument, rendered judgment against the plaintiff for costs. From which judgment the plaintiff appealed.

Battle & Son, for appellant.
No counsel in this Court, *contra.*

READE, J. A conveyance of property by a debtor for his own ease and favor, whereby creditors are delayed or hindered, is fraudulent and void; and that even when the conveyance is made for a valuable consideration, or to
(118) pay or secure a *bona fide* debt. But a manifest qualification of this rule is that the property must be such as the creditor has the right to subject to the payment of his debt.

If a debtor sells his "wearing apparel, Bible and hymn-book, loom," etc., which are exempt from execution for debt, no matter how or for what purpose he makes the sale, his creditors cannot complain; because under no circumstances can the creditor subject that property to the payment of his debt. He cannot therefore be defrauded.

So in our case, let it be conceded that the mother of the defendant sold her property to him for her own ease and favor and without valuable consideration, yet the plaintiff, who is her creditor, cannot complain, because the property was worth only $440; and she was entitled to have exempted from execution $500 worth, if she had so much. So that he was not entitled to subject her property to the payment of his debt.

It is true that if she had died without having sold it, he would have been entitled to have it applied to his debt in whole or in part as the case might be, but she did sell it to the defendant in such manner as to divest the title out of her, in satisfaction of a debt which she owed the defendant of more than $1,000.

This view of the case makes it unnecessary for us to decide the point made by the plaintiff that the defendant as executor *de son tort* has no right to retain for his own debt.

The property is not in his hands as executor *de son tort,* but as his own. There is no error.

PER CURIAM. Judgment affirmed.

Cited: Burton v. Farinholt, 86 N. C., 267.

(119)

SIMMONS H. ISLER v. JOHN H. HADDOCK and others.

1. In an appeal to this Court by the defendant, who makes up a statement of the case and submits it to the plaintiff, who neither objects to the defendant's statement nor gives notice that on account of a disagreement as to such statement the presiding Judge will settle the same, the statement so made up by defendant will be considered in this Court as the record proper.

2. If in such case the Judge who presided at the trial below has gone out of office, and the papers are lost, the only remedy is a new trial.

(*State v. Powers*, 10 N. C., 376; *Hamilton v. McCulloch*, 9 N. C., 29, cited and approved).

ACTION for the recovery of real estate, tried before *Clarke, J.*, at Spring Term, 1872, of JONES.

The facts upon which this case is decided are fully set out in the opinion of *Justice Reade.*

From a judgment in favor of the plaintiff in the Superior Court the defendants appealed.

Haughton, for appellants.
Isler, contra.

READE, J. There was a judgment for the plaintiff, and the defendant appealed, and regularly made the statement of the case for this Court and served it on the plaintiff. No notice was given to the defendant of any objections to the case as made out by him, and he was not notified that because of a disagreement the Judge would settle it; so that the defendant was entitled to have the statement of the case made out by him sent up with the record to this Court. But instead of that, we have the certificate of the Judge that the papers were lost, and, as a substitute, he sends up a statement of the case made by himself.

That statement is not satisfactory to the defendant; and he objects to the case being tried in this Court upon the statement, and moves for a new trial. (120)

It would seem that ordinarily the proper way would be to remand the case, to the end that the defendant might again make out a statement and serve it on the plaintiff, and if they could not agree, let the Judge give notice and settle it.

But the difficulty in this case is that the Judge who tried the case has gone out of office; so that there is no possible way to have the case made up.

In such case the only remedy is a new trial. And for this we have the precedents of *State v. Powers,* 10 N. C., 376; *Hamilton v. McCulloch,* 9 N. C., 29.

PER CURIAM. *Venire de novo.*

Cited: Mason v. Osgood, 72 N. C., 121; *Adams v. Reeves,* 74 N. C., 116; *Simonton v. Simonton,* 80 N. C., 8; *S. v. Murray, Id.,* 365; *Sanders v. Norris,* 82 N. C., 244; *Jones v. Holmes,* 83 N. C., 109; *S. v. O'Kelly,* 88 N. C., 610; *Nichols v. Dunning,* 91 N. C., 6; *Burton v. Green,* 94 N. C., 217; *Comrs. v. Steamship Co.,* 98 N. C., 167; *McGowan v. Harris,* 120 N. C., 140.

LUKE MASON v. JAMES OSGOOD.

Where a defendant appealed to this Court, and made out a statement of the case, to which the plaintiff did not agree, and the presiding Judge being notified of the disagreement, appointed a day to settle the case, of which the parties had notice, but before he did settle the case his term of office expired, and no case was sent up: *Held,* the only remedy for the defendant is a new trial.

(*Isler v. Haddock, ante,* 119, cited and approved).

THIS was originally a petition for a *certiorari,* decided at the last (June) term of this Court; see 71 N. C., 212.

The writ then prayed for by defendant was ordered to issue to *Judge Clarke,* of the Court below, who went out of office before he obeyed the mandate of the Court.

The remaining facts are stated fully in the opinion of the Court.

Hubbard and *Lehman,* for petitioner.
Haughton and *Smith & Strong,* for the plaintiff.

(121) READE, J. The defendant appealed and regularly made out a statement of the case for this Court, to which the plaintiff did not agree, and the Judge, being notified

of the disagreement, appointed a day to settle the case, and notified the parties; but before he settled the case his term of office expired, and so no case was sent up. The appellant moves in this Court for a new trial. And this seems to be the only remedy. This is supported by *Isler v. Haddock, ante,* 119, and by the cases there cited.

PER CURIAM. *Venire de novo.*

Cited: Simonton v. Simonton, 80 N. C., 8; *Sanders v. Norris,* 82 N. C., 244; *Nichols v. Dunning,* 91 N. C., 6; *Comrs. v. Steamship Co.,* 98 N. C., 167.

PAUL COBLE AND WILLIAM D. ROSS v. ROBERT D. THOM.

1. The allotment of "an interest of one hundred dollars in his half of the mill," as the remainder of a homestead, is so vague and indefinite as to be void, and confers no exemption from execution.

2. It is a fatal defect to a re-allotment of a homestead for it to appear that the appraisers were not sworn.

(*Smith v. Hunt,* 68 N. C., 482, cited and approved).

ACTION tried before *Tourgee, J.,* at Spring Term, 1874, of GUILFORD, to recover certain land sold under execution by the Sheriff. The plaintiffs became the purchasers, and a deed was executed by the Sheriff, conveying the property to them.

The defendant refused to give up the possession, alleging that the property sold had been regularly laid off and allotted as his homestead.

It appeared that the property in question was one undivided moiety in a mill and a tract of land; that the defendant's homestead was allotted by metes and bounds, including a tract of land, the dwelling, and one-half in- (122) terest in a mill. It also appeared that the premises in question were included in this allotment, but the plaintiffs contend that there was a re-allotment, in which they were not included. The facts necessary to an understanding of the case are set forth in the opinion of the Court.

There was a judgment for defendant, from which plaintiffs appealed.

Dillard & Gilmer, for appellants.

Mendenhall & Staples, Scott & Caldwell, and *Morehead, Jr., contra.*

READE, J. The premises in dispute were regularly "valued and laid off" to the defendant as his homestead, and therefore it was not subject to sale under execution. Admitting that to be true, still the plaintiffs say that there was a *re-allotment* of the defendant's homestead under sec. 20 of the Homestead Act, and that the premises in dispute were not embraced in the re-allotment.

And whether that is so, is the question. The re-allotment was by metes and bounds of a tract of land of eighty acres, including the dwelling and buildings, and one-half interest in a mill.

The re-allotment was as follows: "We value the place on which he lives at $900, and the remainder of the homestead gives him an interest of one hundred dollars in his half of the mill." This is so vague and indefinite as to amount to nothing. Grant that by reference to the first allotment "the place on which he lives" can be made sufficiently certain, as that is not the matter in dispute, yet what can be made of "an interest of $100 in his half of the mill," as an allotment of a homestead, to be exempt from execution? Suppose the $100 to be a charge upon the real estate (the mill), how is it to be realized? Only by a sale. And yet the homestead is to be exempted from sale. It is not an allotment of one-tenth
(123) undivided share of the mill, or of one-tenth toll-dish, even if that would do, but an interest of $100. This is invalid. There is another objection to the re-allotment. The form prescribed in the statute for the return of the appraisers begins as follows: "The undersigned having been duly summoned and sworn," etc. And sec. 20 provides that in a re-allotment the trustees shall take the oath prescribed for appraisers. In this case the return begins, "We, the undersigned, having been duly summoned to re-assess and allot," etc., saying nothing about being sworn. We think this a fatal defect. *Smith v. Hunt,* 68 N. C., 482.

There are other fatal defects in the re-allotment, which it is not necessary to notice. No error.

PER CURIAM. Judgment affirmed.

STATE v. STANLEY CHERRY.

A justice of the peace has no jurisdiction over the offense of larceny of growing corn. The Act of 1873-'74, ch. 176, does not sufficiently express the intention to give a justice jurisdiction in such cases.

INDICTMENT for stealing corn standing and remaining ungathered in a certain field, tried at Fall Term, 1874, of BERTIE, before *Hilliard, J.*

When the case was called in the Court below, the defendant moved to dismiss the prosecution for the reason that the Court did not have jurisdiction; and his Honor being of opinion with the defendant, allowed the motion. From this judgment Martin, Solicitor for the State, appealed.

Attorney-General Hargrove, for the State.
Winston, Jr., for the defendant.

RODMAN, J. The defendant was indicted in the (124) Superior Court for stealing corn standing in the field, of the value of five cents. He moved to quash the indictment because a justice of the peace has exclusive jurisdiction of the offense and the Superior Court had none.

The Court allowed the motion and quashed the indictment, and the State appealed. The offense is created and made larceny by the Act of 1868-'69, ch. 251, found in Battle's Revisal, ch. 32, sec. 20. By an Act of 1873-'74, ch. 176, p. 259, the Legislature amended several sections of ch. 32, above cited, by fixing the maximum punishment for the offense described in those sections at a fine of fifty dollars, or imprisonment for one month, thereby giving a justice final jurisdiction of them. But sec. 20 is not one of those so amended, and the punishment for the larceny of standing corn remains like the punishment for other larcenies, fine

and imprisonment, at the discretion of the Court, thus excluding the final jurisdiction of a justice. The Act of 1873-'74, in sec. 13, however, does say justices of the peace shall have jurisdiction to hear, try, etc., criminal actions for the offenses described in sec. 20 of ch. 32 of Battle's Revisal. We are of the opinion that the apparently express grant of final jurisdiction over the offense in question to a justice is ineffectual, because the possible punishment for the offense exceeds that which a justice can adjudge under the Constitution, Art. IV, sec. 5. Of course it is within the power of the Legislature so to limit the punishment as to give final jurisdiction to a justice. But the Legislature has not expressly done so as to this offense, and we cannot imply such an intention from sec. 13 of the Act of 1873-'74, with such certainty as to enable us to give it that effect. While such may have been the intention, it is possible, at least, that as the bill was drawn it fixed a maximum punishment for larceny, which provision was stricken from it before its passage, while by inadvertence the language of sec. 13 in reference to sec. 20 of ch. 32 of Battle's Revisal was left to stand unaltered.

We think the Superior Court had jurisdiction of the
(125) offense charged in the indictment, and that the Judge erred in quashing the bill.

Judgment below reversed and case remanded.

PER CURIAM. Judgment reversed.

Cited: S. v. Graham, 76 N. C., 196; *S. v. Fesperman,* 108 N. C., 772; *S. v. Thomas,* 118 N. C., 1229.

WILLIAM THAXTON and others v. JOHN WILLIAMSON and others.

1. A decree in a court of equity regularly enrolled and registered is final and cannot be impeached by a motion in the cause.

2. Before the adoption of The Code, such a decree could only have been impeached by a bill of review, and since its adoption can only be impeached by a civil action commenced by summons.

(*Covington v. Ingram*, 64 N. C., 123; *Singletary v. Whitaker*, 62 N. C., 77, cited and approved).

MOTION, after notice in a former petition in equity, to vacate a decree, heard by *Tourgee, J.*, at Fall Term, 1873, of PERSON.

From the order made by his Honor upon hearing the motion the defendants appealed.

All the facts pertinent to the points decided are fully set out in the opinion of *Justice Settle.*

Dillard & Gilmer, for appellants.
John W. Graham, contra.

SETTLE, J. At the Fall Term, 1859, of the Court of Equity for Person County a petition was filed by the widow and heirs at law of George W. Jeffreys, praying for the confirmation of a sale of the real estate of the said Jeffreys, which had previously been made to James E. Williamson, but which they could not complete without the intervention of a court of equity, in consequence of the (126) death of Cornelia Thaxton (the mother of the present plaintiffs, who were infants), since the sale of the land, but before the execution of a deed therefor. At the same term a decree was filed confirming said sale, and declaring, in accordance with Rev. Code, ch. 32, sec. 24, that the effect of the decree "shall be to transfer to the said Williamson the legal title in the said land as fully as though the conveyance decreed was in fact fully executed." The said decree was duly enrolled and registered, and the cause was put off the docket.

Nothing further is heard of the cause until Fall Term, 1873, of Person Superior Court (at which term the defendant had been notified to appear), when his Honor, on motion, ordered a reference in the said cause to the Clerk of the

Court to take an account and report the amount of the purchase money remaining unpaid by the said James E. Williamson; from which order the defendant appealed.

The first question is, Can the plaintiffs impeach the decree of 1859 by a motion in the cause, or must they do so by a regular action?

This depends upon whether the decree was final or whether the cause was still pending, awaiting further orders and directions.

We think the decree was final, inasmuch as it disposed of the whole cause, granted the relief prayed for, left nothing further to be done, was enrolled and registered; and the cause, under its operation, was dropped from the docket from 1859 to 1873.

This being so, the case of *Covington v. Ingram,* 64 N. C., 123, is directly in point. The Court there holds that a final decree could only have been impeached before the adoption of The Code by a bill of review, and since the adoption of The Code, relief against such a decree can only be had by a civil action commenced by issuing a summons. 3 Dan. Ch. Prac., 1724.

We might stop here, but it will perhaps promote the ends of justice to say that should the plaintiffs bring their
(127) action we think the heirs of Williamson should be made parties. They have an equity in the land to the extent of the payment made by their ancestor, and the plaintiffs have an equity to the extent of the purchase money still remaining due and unpaid. And if it be true that the purchase money, or any part thereof, is still due and unpaid, it will be difficult for the defendants to suggest a defense which will, to use the forcible language of the Chief Justice in *Singletary v. Whitaker,* 62 N. C., 77, "avail anything in the face of the fact that the defendants have the land of the plaintiffs, but have not paid for it."

The order of his Honor making a reference to the Clerk is erroneous.

PER CURIAM. Error.

Cited: Eure v. Paxton, 80 N. C., 19; *Peterson v. Vann,* 83 N. C., 122; *England v. Garner,* 84 N. C., 214; *Fleming v. Roberts, Id.,* 539; *Thompson v. Shadwell,* 89 N. C., 286; *Mock v. Coggins,* 101 N. C., 368; *Smith v. Fort,* 105 N. C., 453.

JOSIAH TURNER, JR., v. STEPHEN A. DOUGLASS.

1. Any irregularity on the part of a sheriff in serving a summons is waived by the defendant's answering, although such defendant be an infant.

2. An infant is properly brought into court just as any other defendant is. Where there is no general guardian the service of the summons must be a personal one.

3. A plaintiff is not bound to move for the appointment of a guardian *ad litem* for an infant defendant; and his failure to do so is not such laches as will work a discontinuance of the action.

4. In an action against an infant who appears by an attorney, an order changing the venue is not irregular or void; it is erroneous, and may be reversed or vacated upon application of the infant, upon his arriving at age.

(*White v. Albertson*, 14 N. C., 341; *Bender v. Askew, Ibid.*, 149; *Caldwell v. Park*, 61 N. C., 54; *Dick v. Lanier*, 63 N. C., 185; *Skinner v. Moore*, 19 N. C., 138; *Marshall v. Fisher*, 46 N. C., 111, cited and approved).

ACTION for assault and false imprisonment, brought originally in Orange, and thence removed upon affidavit to Granville, from whence it was carried to WARREN and (128) tried at Fall Term, 1874, *Watts, J.*

In September, 1870, the plaintiff sued out his summons against the defendant Douglass, and W. W. Holden, and one G. B. Bergen, returnable to Orange Superior Court. In this summons nothing was stated as to the infancy of Douglass, the sole defendant in this part of the case, a separation having been ordered by the Court at its trial term. The summons was returned "executed" on all the defendants; and at the return term plaintiff filed his complaint, and the defendants Holden and Douglass at the same term filing their several and separate answers. Bergen filed no answer.

Nothing was done with the case except to change the venue until Fall Term, 1873, when it was continued as to Holden, and tried by a jury as to Douglass, who was not present, nor had he been present, either in person or by attorney, since filing his answer as above stated.

The jury returned a verdict of guilty as to defendant Douglass, and in accordance therewith judgment was entered up.

At the ensuing Spring Term, 1874, Douglass filed the following affidavit, upon which he moved that the judgment

obtained at the previous term against him be set aside and the suit discontinued as to him:

GUILFORD COUNTY—*ss.*

I. Stephen A. Douglass, one of the defendants above named, being duly sworn, says, that in the above-entitled case, in the Superior Court of Orange County, before its removal to the county of Granville, he filed his separate answer, under oath, to the plaintiff's complaint; that he employed and was represented in said cause by Hon. Samuel F. Phillips, an attorney of the Court; that defendant never employed any other attorney in said cause, and relied exclusively upon him to conduct his defense; that affiant, so relying upon his attorney as aforesaid, was not aware that said cause would be (129) called for trial in the Superior Court of Warren County in the month of August, A. D. 1873, at which time the judgment of $10,000 was obtained against him by the plaintiff; and had no knowledge from any source that said cause would be reached in August, 1873, as aforesaid; that from 5 July, 1873, until November of that year, affiant was in Chicago, in the State of Illinois, having gone to that city upon business of importance; that said judgment, being so obtained in the absence of affiant, was a complete surprise, for the reasons hereinbefore mentioned and set forth.

II. Deponent further says, that when said judgment was obtained, as he is informed and believes, his said attorney, Hon. Samuel F. Phillips, was not present; and deponent, not being present himself, was not represented by counsel; deponent is further informed and believes that his said attorney did not practice in the courts of Granville or Warren, but that notwithstanding he did not attend or practice in said courts, it was his intention, whenever said cause was tried, to give the same his personal attention, and took no measures to secure the services of other counsel therein for that reason; that in ample time previous to the sitting of said Warren Court, in the month of August, 1873, as aforesaid, the said attorney, deeming it possible that the said cause might be reached, took measures considered by himself to be sufficient to inform himself of the condition of the docket in said Warren Court with a view to attend said Court for the purpose of defending said cause in behalf of deponent, and addressed a

note or letter to the Hon. Samuel W. Watts, Judge of the District in which Warren County is situated, asking for information as to the condition of said docket; that for some reason unknown to said attorney he received no reply to his said letter, and therefore believed that the said causes would not be reached, and did not attend, for that reason, the said term of Warren Court; and deponent is informed and believes that the first knowledge his said attorney had of the rendition of said judgment against deponent was received in the month of October, 1873. (130)

Deponent further says that his answer aforesaid was drawn by his said attorney in Hillsboro in the county of Orange from statements made by deponent; that the first and second paragraphs of said answer, as the same appeared of record after the removal of said cause to Warren Superior Court, truthfully represent a portion of deponent's defense upon which he relied, but that the third paragraph of said answer, as the same appears of record in Warren County, does not represent deponent's defense; a material one, to-wit, the word "not" after the word "did" and before the word "advise," being omitted from said third paragraph, whereas deponent meant to say, and believed he had said, that he "did not" advise, command, encourage or assist said Hunnicutt, Bergen or Kirk, or any other persons under the command of them or either of them, etc., etc., to commit the injuries to the plaintiff in the complaint set forth, or any part of them. But deponent says he does not know whether the omission of the word "not" as aforesaid occurred at the time of the said answer, or subsequently, when the said answer was transcribed in removing the cause from Orange to Granville and from Granville to Warren, but that whenever the same occurred he avers it was a clerical error and not intended.

IV. Deponent insists that when the said cause as between the plaintiff and himself was submitted to the jury in the said Warren Court in the month of August last, the said answer, by the omission of the word "not" as aforesaid, did not raise the issue intended by him to be raised, and which he believed had been raised; and said omission was without any default or laches on his part, and without his knowledge.

V. Deponent further says that he is informed and believes that no issues arising upon the pleadings were drawn up in

writing and settled by the Judge and presented to the jury in Warren Court, where said judgment was rendered, as required by the rules of practice adopted at the June Term, 1871, of the Supreme Court.

(131) VI. Deponent further says he was not twenty-one years of age at the time said action was brought, nor when he made his affidavit for the removal of said cause from the county of Orange, having been born on 3 November, 1850.

VII. And deponent says he has fully and fairly stated his case to his said attorney, and that he has a good and substantial defense upon the merits thereof, as he is advised by his said attorney, after such statement made as aforesaid, as he verily believes.

Wherefore deponent applies to the Court to vacate and set aside the said judgment on the ground of his mistake, inadvertence, surprise and excusable neglect.

S. A. DOUGLASS.

Subscribed and sworn to before me, this 6 February, 1874.

ABRAM CLAPP, C. S. C.

The grounds insisted on for his motion to discontinue, are:

1. By reason of the failure of the plaintiff to take proper steps to have a guardian *ad litem* appointed by the Court to defend the interests of the defendant Douglass, who for three terms next after the commencement of the action continued to be an infant under twenty-one years; and there being no service of summons upon said Douglass nor voluntary appearance by him after his majority.

2. By reason of the failure of the plaintiff to re-issue the summons as against the defendant Bergen, and the record does not show that there was a service of the original summons, and he has never by counsel or in person appeared.

The defendant Holden, at the same time, moved to discontinue as to him, for the same reason: that the plaintiff by not taking the necessary steps to get the parties sued into Court, had abandoned his case.

His Honor allowed the motion of the defendant Douglass, and set aside the judgment against him and discontinued the case as to him.

From the ruling of his Honor the plaintiff appealed. (132)

Devereux and *Jones & Jones,* for appellant.
Moore & Gatling, Argo and *Ball & Keogh, contra.*

RODMAN, J. 1. Whether the omission of the Sheriff of Wake to state in his return when, where and how he served the summons upon the defendants was an irregularity for which the service could have been set aside, had a motion to that effect been made in due time, it is unnecessary to decide. The irregularity was waived by the subsequent action of the defendants, notwithstanding the infancy of one of them.

2. It is contended that as the defendant Douglass was an infant at the time of the service of the summons it was void as to him. We think otherwise. An infant is properly brought into Court just as any other defendant is. We do not say that service upon a general guardian is not so. *White v. Albertson,* 14 N. C., 341. But when an infant has no general guardian, the service to bring him into Court must necessarily be a personal one, as a guardian *ad litem* is never appointed until the Court has jurisdiction of the action by the return of the summons.

The point most strongly insisted on for the defendant Douglass is that the action was discontinued as to him by the failure of the plaintiff for several terms to move the Court to have a guardian *ad litem* assigned to him by whom he might appear and plead. There are two sorts of discontinuances: First, where the plaintiff, discovering that the defense is a good one, gives notice that he discontinues the action and pays the cost, or else discontinues upon motion and by leave of the Court, with or without the payment of costs, according to circumstances. It is unnecessary to say anything concerning this class of discontinuances. Second, when a plaintiff negligently fails to prosecute his action for one or more terms, whereby the defendant having been once brought into Court has no day given him before the end of a term whereon to attend and prosecute his defense. Of this, *Caldwell v. Parks,* 61 N. C., 54, is an example. And so where a (133) summons is executed upon one of several defendants, and the plaintiff omits to renew his process against those not served, the action is discontinued as to all. For it would be

unreasonable to keep those who were served in Court indefinitely. *Dick v. McLaurin,* 63 N. C., 185. And it may be well to note here that that and similar cases have no direct application to this, as in this case, according to the Sheriff's return, all the defendants were served. Now has the plaintiff been guilty of laches in respect to any duty imposed on him by law, to the prejudice of the defendant? It is clear that an infant can only appear and plead by guardian, and if he appear by attorney a judgment against him will be reversed for error, or set aside on motion.

It is clear also that if a plaintiff *happens* to know that a defendant is an infant, he *may* move the Court to appoint a guardian for him. But it is nowhere said that he *must* do it under penalty of discontinuing his action. This would be unreasonable, as the plaintiff may oftentimes not have the means of knowing that the defendant is an infant. It is to his interest to know it, if it be so, otherwise he runs the risk of taking a judgment liable to be reversed, but we cannot conceive that he is obliged to do what may be an impossibility.

In our opinion, the Judge erred in holding the action discontinued as to Douglass, and in dismissing it as to him. We have thought it best to lay no stress on the fact that continuances appear to have been entered on the record from term to term. Because these although as long as they stand are valid and binding orders of the Court, yet they are open to be amended by the Judge according to the fact, by inserting them if they do not appear, when in truth and justice they ought to, and by striking them out when they ought not to be there.

4. It is contended that the several orders for the change of *venue* having been made during the infancy of Douglass, and whilst he was appearing by attorney, are void, and hence the Court of Warren had no jurisdiction. This is a mistake. A judgment taken against an infant who ap-
(134) pears by attorney is not irregular or void; it is only erroneous and liable to be reversed, but valid until reversed. *Pender v. Askew,* 14 N. C., 149; *White v. Albertson, Ibid.,* 341; *Skinner v. Moore,* 19 N. C., 138; *Marshall v. Fisher,* 46 N. C., 111. The same principle applies to the orders for change of *venue:* they are not irregular or void; they are erroneous, and may be reversed or vacated on appli-

cation of the infant, now that he has attained full age. There is error in the judgment below, which is reversed, and the case is remanded to be proceeded in.

PER CURIAM. Judgment below reversed.

Cited: Turner v. Holden, post, 134; *Burgess v. Kirby,* 94 N. C., 580; *Tate v. Mott,* 96 N. C., 25; *Syme v. Trice, Id.,* 246; *White v. Morris,* 107 N. C., 99, 100.

JOSIAH TURNER, JR., v. W. W. HOLDEN.

(For syllabus see the preceding case of *Turner v. Douglass*).

THIS is a part of the preceding case of *Turner v. Douglass,* and the motion to discontinue was decided at the same term. The facts are fully stated in the preceding case. From the refusal of his Honor to discontinue the case as to defendant Holden he appealed.

Moore & Gatling, for appellant.
Devereux and *Jones & Jones, contra.*

RODMAN, J. This appeal was taken from the ruling of his Honor, that the action was not discontinued as to the defendant Holden. As we have decided in the case of the present plaintiff against Douglass, *ante,* 127, that the action was not discontinued as to him, the ground on which the present appeal was taken, fails. There is no error in the judgment appealed from, which is affirmed, and the case (135) is remanded to be proceeded in, etc.

PER CURIAM. Judgment affirmed.

JOHN ANDREWS v. THOS. E. PRITCHETT and E. G. McDANIEL.

It is the duty of a sheriff to lay off the homestead of the defendant in the execution, and to sell the excess in a prudent and just manner so as to realize a fair price: *Therefore*, where a sheriff sold at the instance of the defendant several parcels of land *en masse* and subject to the lien of the homestead: *It was held*, that such sale was fraudulent, and might be avoided by a creditor of such defendant not present nor consenting to the sale.

ACTION for recovery of real estate, tried at Fall Term, 1874, of JONES, before *Seymour, J.*, and a jury.

The action was originally commenced against the defendant Pritchett, the tenant in possession. At Spring Term, 1873, E. G. McDaniel, claiming to be the landlord of Pritchett, was made a party defendant upon the usual terms, when the two joined in the answer denying the plaintiff's title.

The plaintiff claimed title to the premises in question under a deed from the Sheriff of Jones County, executed in the spring of 1873, upon a sale under an execution duly issued against one F. McDaniel, the owner of the land and the father of the defendant E. G. McDaniel.

The defendants also relied upon a deed from the said Sheriff executed in May, 1872, upon a sale of the same land under an execution duly issued against the said F. McDaniel.

The main question arising on the trial was one of fraud, to establish which the plaintiff introduced testimony
(136) tending to show that at the first sale there was collusion between the father, F. McDaniel, the judgment debtor, and the defendant E. G. McDaniel, his son. The collusion was denied by the defendants' evidence.

On the trial it was in evidence, and not contradicted, that at the first sale by the Sheriff two parcels of land—one in the country, three miles from the village of Trenton, and the other consisting of a number of lots in that village—were sold *en masse* by the Sheriff, and were purchased by the defendant E. G. McDaniel for about $200. That the Sheriff, and the purchaser and F. McDaniel, against whose property the execution issued, were well aware of the situation of the different tracts of land, and that they were so sold altogether at the request of the said F. McDaniel, the judgment debtor; and also at his request the sale was made of his interest,

"subject to all legal claims," without laying off his homestead. There was evidence that he, the judgment debtor, did not relinquish his right to a homestead, but supposed that the sale was made subject to it. The tract of land in the country, estimated to be worth from $700 to $1,000, continued to be occupied by the said F. McDaniel, the judgment debtor, and was subsequently assigned to him for a homestead, upon his going into bankruptcy. The lots in the village are estimated to be worth from $500 to $1,000.

The plaintiff requested his Honor to instruct the jury "that the Sheriff sold as an officer of law; and if he did not sell the land in the way it would bring the best price the sale is void, although the purchaser had nothing to do with the way in which the Sheriff sold." This instruction his Honor refused, as he did also the following, asked by defendants, to-wit: "That if the defendant in the execution, the said F. McDaniel, assented to a sale *en masse* of the premises, that is a waiver of any objection upon that point, and as to that, a sale *en masse* by the Sheriff was good."

The Court charged the jury that upon the question of fraud they might consider the relationship of the parties; the value of the land purchased as compared (137) with the amount given for it; the fact that F. McDaniel remained in possession; certain conversations at the sale; the resale of the home plantation to the father, F. McDaniel; and the fact that the defendant E. G. McDaniel was aware that his father had been sued. That if, upon considering all the evidence, they believed there was an understanding between the father and the son, the defendant E. G. McDaniel, by which the land was to be purchased for the benefit of the father, or a purpose to defraud creditors, they would find the issue of fraud in favor of the plaintiff; if they believed the transaction was an honest one, they would find for the defendant. And the Court submitted the following issues to the jury:

1. Was the real estate of F. McDaniel sold by Sheriff Anderson, on the John McDaniel execution, in such a manner as was likely to bring the best price? To which the jury responded that "It was not."

2. Did Sheriff Anderson sell the two tracts *en masse* at the request of F. McDaniel? The jury found that "He did."

3. Is the Sheriff's deed to E. G. McDaniel for the land sold under the execution against F. McDaniel void by reason of fraud? The jury "found no fraud on the part of the defendant E. G. McDaniel."

Upon these findings of the jury his Honor gave judgment for the defendants. From which judgment the plaintiff appealed.

Green, for appellant.
Haughton, contra.

READE, J. It is clearly the duty of a sheriff to conduct his sales in a prudent and just manner, so as to realize a fair price for the property sold. And if he does otherwise the sale is voidable. Voidable by whom? The general answer is, voidable by any person injured thereby; by the defendant in the execution; by the plaintiff in the execution; by (138) any creditor of the execution debtor. But it is equally clear, that no matter how irregular soever the sale may have been, no one can complain of it who was consenting to it. Therefore, as against the defendant in the execution, the sale in question was valid, because he was not only consenting to it, but connived it. And, so far as we know, it was valid also as against the plaintiff in the execution; for he does not complain, and as it may be supposed, received the money realized in satisfaction of his execution. But the plaintiff in this action was creditor of the defendant in the execution, and had the right to have his claim satisfied out of the defendant's property, which is alleged to have been sacrificed. And although the sale was valid as against every one else, yet he says that he is injured and has the right to avoid the sale. And his legal inference is right, if the sale was irregular.

The first question then is, Was the sale irregular?

There was a tract of land in the country estimated at the value of from $700 to $1,200, and several lots in town valued at from $500 to $700. And the defendant in the execution had the right of a homestead of a $1,000 value in the whole. It was the duty of the Sheriff to have the homestead laid off and sell the excess. But instead of that, he, at the instance of the defendant in the execution, sold the whole *en masse,*

with the lien of the homestead upon the whole; so that no one could know where the homestead would be laid off or what he would get if he bought at the sale. The consequence was that the land was bid off by the defendant in this action, who is a son of the defendant in the execution, at the price of $200.

It does not require the intervention of a jury to stamp this transaction with fraud. The facts being found, or admitted as stated, the invalidity of the sale is a legal inference.

Before the adoption of The Code the remedy would have been administered either in the law or equity courts, according to circumstances; but now this action embraces both remedies. It has been treated, however, as if it were an action of ejectment at law, and the effect of the judgment below is to sustain the sale as valid; whereas, it is (139) clearly voidable. And yet a judgment the other way would have been equally erroneous, for it would have taken the land away from the defendant and given it to the plaintiff, without allowing the defendant the $200 which he paid for the land, and for any improvements which he may have made.

We must, therefore, declare that the judgment below is erroneous; and remand the case, with the suggestion that the rights of the parties to the transaction, and to this suit, are, that the debtor defendant in the execution is entitled to his homestead, to be laid off to him, if it has not already been done; that this defendant, the purchaser at the execution sale, holds the excess in trust, first, by a resale to reimburse himself the price which he paid and any other charges for betterments; and that this plaintiff is entitled to the excess of the value of the land, to the amount of this debt, if the excess shall be so much.

We suppose that the pleadings can be so amended below, and proceedings so regulated as to administer the rights of all the parties. To this end there must be a *venire de novo* and the cause remanded.

PER CURIAM. *Venire de novo.*

Cited: Mebane v. Layton, 89 N. C., 399; *McCanless v. Flinchum,* 98 N. C., 364, 372; *McCracken v. Adler,* 98 N. C., 402.

MARY SMITH v. WILLIAM SMITH.

On a trial of an action for divorce it is the duty of the presiding Judge to confine the jury to the issues by reciting the testimony and applying the law pertinent thereto. And it is error for his Honor to charge that "it is for the jury to say whether her (the plaintiff's) complaints are well founded. According as they shall determine, she is to return to her home, or to have that portion of her husband's estate allotted to her which the law allows in such cases"; and such charge entitles the defendant to a new trial."

ACTION for divorce *a mensa et thoro,* tried before (140) *Buxton, J.,* at Spring Term, 1873, of HARNETT.

The plaintiff and defendant had been married forty-six years, had lived together until some time in the year 1870, and had raised a family of children.

As sent up to this Court the record states that the petitioner offered evidence tending to prove that she and her husband lived unhappily together for upwards of twenty years; that this unhappiness was occasioned by his forming an unlawful connection with another woman, one Mary Wood, who lived on his plantation, and by whom he had a number of children; that this woman was the cause of frequent quarrels between them, in which quarrels he would curse, threaten and sometimes whip her. That after the death of Mary Wood, which occurred some eight or nine years ago, she and her husband still got on badly together; that some of the Wood children were taken to the house to live, and called him "pap"; that her husband kept the keys and gave out the provisions, she having nothing to do with the housekeeping, except to do the cooking; that when he was away, he left the keys with some of the Wood children, who "jawed" her more than they ought to. It was further stated that when he was drinking he would "curse and rear around," and that she was afraid of him; that in 1870, between sunset and dark, she went over to a neighbor's house, looking troubled and scared, and that she had not lived with him since. That the parties had entered into a written agreement of separation, but that he had not furnished her all the articles for her support therein stipulated, particularly the whole of the flour agreed on.

There was no evidence that the defendant whipped his wife after the death of Mary Wood. It was proved by one of the

plaintiff's witnesses that she had sometimes invited one of the Wood children to stay with her at night; that she had been heard to say, all she wanted was to see the last thing he had destroyed, and then she would die satisfied; and that the reason assigned by the husband for not entrusting to her the keys was that she had sold off some corn, and he was afraid she would sell off meat; and further, that after (141) she had left him he had rented out his land, but reserved a house for her, in case she took a notion to come back.

During the progress of the trial it became a question, How far back the plaintiff should be allowed to go in furnishing evidence of acts of indignity from her husband to herself; and his Honor was of opinion at first, and so ruled, and had the issue so drawn, limiting the inquiry to a period of ten years. See Code of Civil Procedure, sec. 37. Under this ruling (the defendant having introduced no evidence) the plaintiff's counsel had commenced to address the jury and was conforming his argument to the ruling of the Court, when his Honor's attention was called by the defendant's counsel to sec. 34, subdiv. 5, of The Code, limiting the period for the commencement of actions for criminal conversation, etc., to three years. His Honor thereupon stopped the argument, and ordered the issues to be so amended as to restrict the inquiry to the indignities, etc., offered by the husband to a period of *three* years next before commencing the action, instead of to *ten* years, as the issue was originally framed. This being done, the plaintiff asked leave to offer additional testimony, which leave was accordingly granted and the evidence re-opened.

The evidence offered (after the examination of witnesses was again permitted) by plaintiff and defendant, being immaterial to a proper understanding of the decision of this Court, need not be stated. The plaintiff, herself, was examined after objection by defendant.

In the course of his charge to the jury his Honor made use of the following expressions:

"This is a sad, sad case—as sad a case as I ever saw in the court-house. The parties, petitioner and defendant, have been married forty-six years, and now the petitioner asks for a separation from the bed and board of her husband, on the ground of ill-treatment. It is for the jury to say whether her complaints are well founded. According as they shall

determine, she is to return to her home, or to have that
(142) portion of her husband's estate allotted to her which
the law allows in such cases." To this the defendant excepted.

The following issues, after being amended under the direction of the Court, were submitted to the jury, to-wit:

1. Did the cause of complaint exist six months previous to this suit?

2. Were the parties married and resident in this State for three years previous to this suit?

3. Has the defendant during the three years of their married life previous to this suit, offered such indignities to the person of his wife, the petitioner, as to render her condition intolerable and her life burdensome?

The jury, for their verdict, found all the issues in favor of the plaintiff. Rule for a new trial for alleged error of the Court:

1. In admitting the petitioner to testify;

2. In the portion of the charge above quoted;

3. In that the defendant's case had been prejudiced by first allowing proof of ill-treatment as far back as ten years, and then after the case was concluded, re-opening it and allowing the wife to testify as to treatment within three years.

Rule discharged. Judgment, and appeal by defendant.

Neil McKay and *Hinsdale,* for appellant.
Spears, contra.

BYNUM, J. That part of his Honor's charge to the jury which is excepted to by the defendant is as follows: "This is a sad, sad case—as sad a case as ever I saw in the courthouse. The parties, petitioner and defendant, have been married forty-six years, and now the petitioner asks for a separation from the bed and board of her husband, on the ground of ill-treatment. It is for the jury to say whether her complaints are well founded. According as they shall determine, she is to return to her home, or to have that portion of her husband's estate allotted to her which the law allows in
(143) such cases." As no other part of the charge is set forth in the case, we must assume that his Honor, in the other parts of his charge to the jury, did not qualify, ex-

plain or substantially vary that portion which is recited. The question is, Did his Honor err therein to the prejudice of the defendant? Issues of fact in writing had been submitted to the jury and much conflicting testimony had been given by the plaintiff and defendant, and it was upon the trial upon these issues that the charge above recited was given. Suppose these questions had been submitted to the jury as an issue, to-wit: Are the complaints of the petitioner well founded? and the jury had responded in the affirmative. Could a court upon that finding decree a divorce? Clearly not, because such an issue is wanting in legal accuracy and substance and the finding must be equally defective. The petition contains many complaints, some irrelevant, some immaterial and some in aggravation only, and the very purpose of the issue was, from the mass to separate what was material and submit it to the distinct consideration of the jury, untainted by these extraneous matters which are too often lugged in before the jury and carry verdicts against right.

As the record before us shows, his Honor, inadvertently, no doubt, submitted to the consideration of the jury, not the issues which alone were properly before it, but the "complaints" of the petitioner, which were not before the jury, but were contained in the pleadings; and the jury were directed not to respond to the issues, but ascertain whether the "complaints of the petitioner were well founded." Possibly the jury was not misled, but where there is error in the charge of the Court the conclusion of law is that the jury were misled to the prejudice of the defendant. The law, therefore, applies the remedy by awarding a *venire de novo*. It was the duty of the Court to confine the jury to the issues by reciting the testimony and applying the law pertinent to them. But his Honor opened to the jury a much wider field of investigation, and in this there is error. As the case goes back, it is unnecessary to examine the other interesting questions presented by the exceptions. Before another trial it (144) would be well for the counsel of the plaintiff to consider whether the complaint will support a decree for divorce. The law does not encourage divorces, and before the Court will grant them the petition and subsequent pleadings must conform to the rules prescribed with much particularity by statute. Battle's Revisal, ch. 31.

PER CURIAM. *Venire de novo.*

STATE v. COLLINS.

On the trial of an indictment for stealing a national bank-note and a United States Treasury-note, it is necessary for the jury to find specifically that such bank-note, or such Treasury-note, was stolen. And evidence that the prisoner stole one or the other of such notes, the witness being unable to say which, will not justify a verdict of guilty.

INDICTMENT for larceny, tried before *Watts, J.,* at Spring Term, 1875, of WAKE.

The indictment charges the defendant with stealing "one national bank note of the denomination of five dollars, of the value of five dollars," one treasury-note of the denomination of five dollars, of the value of five dollars, etc. Upon this indictment the defendant was tried and convicted. The Solicitor praying judgment, the defendant was sentenced to imprisonment in the State penitentiary for two years, and from that judgment he appealed.

The material facts in the case appear in the opinion of the Court.

Lewis, for defendant.
Attorney-General Hargrove, for the State.

(145) READE, J. The defendant is charged in one count with stealing "one national bank note of the denomination of five dollars, one treasury-note of the denomination of five dollars." It is uncertain whether the charge should be construed to be that he stole *both* a treasury-note and a bank-note, or that he stole one or the other, and *only* one. It would have been proper to charge in one count the stealing of a bank-note *and* a treasury-note, or to charge the bank-note in one count and the treasury-note in another count. We suppose from what appeared in evidence, that the indictment was put in this rather dubious form to meet anticipated dubious evidence. But this cannot avail, because both the evidence and the indictment ought to be specific and certain. We have to take the indictment as charging the stealing of both a bank-note and a treasury-note, and that is sufficient. But still, in order to convict, it was necessary to prove, not the stealing of one or the other, not knowing which, but specifically which one.

And the witnesses said "that they did not know whether the bill was one issued by the Treasury Department, or by some one of the national banks, but it was a bill in usual circulation. No evidence as to but one bill being stolen." The jury returned a verdict of "Guilty." But guilty of what? They could not know more than the witness knew, and the witnesses did not know what. This is not like the case of *State v. Williams,* 31 N. C., 140, where the defendant was indicted under the statute for stealing a slave, in several counts; one that the taking and carrying away was by "violence," and another that it was by seduction, and others varying the *manner* of doing the thing. There it was held sufficient if the jury found that he did it in either way. But this is like the case of *Regina v. Bond,* 1 Bennett & Heard Leading Crim. Cases, 553, where the defendant was indicted for stealing *coin,* but of what particular denomination the witness did not know. And so the indictment charges him with stealing every denomination of coin used in England. The case went up to Queen's Bench and was much discussed, and all the Judges, but one, concurred that the defendant could not be convicted. In that case it was said that (146) the difficulty had arisen in cases of embezzlement, and a statute had been passed to remedy it; but the statute did not embrace larceny. It was probably in consequence of that decision that a statute was passed, 14 and 15 Vict., ch. 100, sec. 18. "In every indictment in which it shall be necessary to make any averment as to any money, or any note of the Bank of England, or of any other bank, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note, and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved." If we had a like statute here, it may be that it would facilitate the conviction of offenders. There is error.

PER CURIAM. *Venire de novo.*

Cited: S. v. Freeman, post, 522.

STATE v. CHARLES D. UPCHURCH.

1. The Superior Courts have exclusive original jurisdiction of misdemeanors arising under sec. 19, ch. 115, Laws of 1873-'74—failing to give in his poll for taxation.

2. "Thirty days," as used in Art. IV of the Constitution, is not synonymous with "one month"; it may be more or less.

(*Rives v. Guthrie*, 46 N. C., 84; *State v. Perry*, 71 N. C., 522, cited, approved and distinguished from this).

CRIMINAL ACTION for failing to give in and list his poll tax, tried at the January Term, 1875, of WAKE, before *Watts, J.*

(147) The defendant was held to answer upon the following bill of indictment:

NORTH CAROLINA—Wake County.

Superior Court, January Term, 1875.

The jurors for the State upon their oath present: That Charles D. Upchurch, late of Wake County, on the first day of April, in the year of our Lord one thousand eight hundred and seventy-three, at and in said county of Wake, was a male inhabitant of the State of North Carolina, over twenty-one and under fifty years of age, and was then and there a resident of and in Raleigh Township in the county aforesaid; and was then and there subject and liable, under the Constitution and laws of the State, to a capitation tax of one dollar and five cents for the year of our Lord one thousand eight hundred and seventy-three, to be paid by the said Charles D. Upchurch to the State of North Carolina aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Charles D. Upchurch on the said first day of April, A. D. 1873, and on each and every day between the said 1 April and 7 July, A. D. 1873, in the county aforesaid, did unlawfully and wilfully omit, neglect, refuse and fail to give himself in and list his poll for taxation, either to or before the Township Board of Trustees of said township, or to and before the Board of Commissioners of said county of Wake, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

J. C. L. HARRIS, *Solicitor.*

On the trial below, there being no traverse as to the facts, the jury returned a verdict of guilty; whereupon the defendant moved to arrest the judgment on the ground that the Superior Court had not jurisdiction. His Honor upon consideration, being of opinion with defendant, allowed the motion and arrested the judgment. From this (148) judgment Solicitor Harris appealed.

Attorney-General Hargrove, with whom was *Harris,* Solicitor, and *Haywood,* for the State.

Snow and *Purnell,* for the defendant.

RODMAN, J. By an act ratified 28 February, 1873 (Acts of 1872-'73, ch. 115, sec. 15), the General Assembly enacted that "All persons who are liable for a poll tax, and shall wilfully fail to give themselves in, and all persons who own property and wilfully fail to list it within the time allotted, before the list-taker and the County Commissioners, shall be deemed guilty of a misdemeanor, and on conviction therefor shall be fined not more than fifty dollars, or imprisoned *not more than thirty days.*" The same provision is found in the Act of 1873-'74, ch. 133, sec. 19.

The bill of indictment in this case is for a violation of the above act, and the only question presented to us is whether the Superior Court or a justice of the peace had jurisdiction to try the offender. The Constitution, Art. IV, sec. 15, provides that the Superior Court shall have exclusive original jurisdiction of all criminal actions in which the punishment *may* exceed a fine of fifty dollars or imprisonment *for one month;* and sec. 33 gives to justices of the peace, under such regulations as the General Assembly shall prescribe, a like jurisdiction of all criminal matters arising within their counties, where the punishment *cannot* exceed such fine or imprisonment. So that the question of jurisdiction resolves itself into this, Is "thirty days" synonymous with "one month," as used in this article of the Constitution; or rather, may not thirty days exceed one month? For if it *may,* then the punishment may exceed the constitutional limit to the jurisdiction of a justice, and the exclusive jurisdiction must be vested in the Superior Court.

We have not found in any modern case or any treatise on the law any definition of the word "month" which makes it synonymous with thirty days, or by which it cannot
(149) sometimes be a period less than thirty days. The modern authorities, which are very numerous, recognize but two sorts of months, lunar and calendar. The lunar month when spoken of in statutes consists of twenty-eight days; a calendar month contains the number of days ascribed to it in the calendar, varying from twenty-eight to thirty-one. If the word in the article cited means a lunar month, an imprisonment for thirty days would always exceed the constitutional limit. We are of the opinion, however, that whatever the word month may mean in other parts of the Constitution, in this article it must be held to mean a calendar month. In this State before the Act of 1854, Rev. Code, ch. 108, sec. 2, the word month meant in our statute, if not otherwise explained by the context, a lunar month. *Rives v. Guthrie,* 46 N. C., 84. That statute, however, gives to the word a new definition, viz., that of a calendar month, which we must suppose was the meaning intended in the Constitution of 1868, unless there be something to show the contrary. Assuming, then, that "month" means in this article a calendar month, an imprisonment of thirty days will exceed a month whenever the judgment is rendered in February (unless it be in a few of the last days of the month), by one or two days, and will thus exceed the constitutional limit of a justice's jurisdiction. We cannot suppose that the General Assembly intended to make the jurisdiction of the courts dependent upon the number of days in the particular month in which a criminal action might happen to be tried, and to shift from one court to the other, as the number was less than thirty, or equalled, or exceeded it. No reason can be imagined for requiring a criminal action for an offense to be tried for one month in the year in a Superior Court, and in the other eleven months before a justice of the peace. Either the Superior Court or a justice must have a constant jurisdiction of the same offense. And as the punishment of the offense in question *can* and might often exceed that which a justice has the right to impose, the jurisdiction must be at all times exclusively in the Superior Court. The mem-

bers of the General Assembly are familiar with the (150) language of the Constitution. It is reasonable to suppose that if they had intended to give jurisdiction to try this offense to a justice, they would in limiting the punishment have used the word in the Constitution, and not others, which though near it in meaning are yet substantially different. It may well be that while they intended to limit the punishment to a moderate one, the variation was made expressly to exclude the jurisdiction of a justice. At all events, we can only gather their intention from the words they have used, which express a different period of time from the word used in the Constitution. It must be observed that the offense under consideration here is not expressly referred to, nor is jurisdiction of it expressly given to a justice by the Act of 1873-'74, ch. 176, as was the case with the offense in *State v. Perry,* 71 N. C., 522. Consequently the reasoning in our opinion in that case, founded upon such express gift, would not be applicable here. The Superior Court has jurisdiction and the Judge below erred in arresting the judgment.

PER CURIAM. Judgment reversed.

Cited: S. v. Buck, 73 N. C., 267; *S. v. Edney,* 80 N. C., 361; *S. v. Jones,* 83 N. C., 659.

E. E. MENDENHALL v. J. A. DAVIS.

Where A indorsed a note to B with the understanding that such indorsement should have no other effect than to assign the property in the note to the plaintiff, and to guaranty him against its confiscation by the United States: *Held,* that parol evidence was admissible to prove such understanding and contract.

(*Love v. Wall,* 8 N. C., 313; *Gomez v. Lazarus,* 16 N. C., 205; *Davis v. Morgan,* 64 N. C., 570, cited and approved).

ACTION on the indorsement of a bond, tried before (151) *Tourgee, J.,* at Spring Term, 1874, of GUILFORD.

The following are the facts pertinent to the points decided in this Court:

In December, 1863, the plaintiff loaned the defendant $2,000 in bank-bills, and took his bond with security for its

payment. Payments had been made on this bond, reducing it to about $1,600 on 24 March, 1865. At that time the defendant, who held a certain bond on one Thom and others, which he had obtained from the administrator, one Stafford, in the settlement of his wife's share of an estate, and was about the same amount of the bond he, the defendant, owed the plaintiff, offered to transfer this bond on Thom to the plaintiff in payment of his own, given as before stated, for borrowed money. After inquiry by the plaintiff as to the solvency of the bond on Thom and the others, sureties, he agreed to take it, and the defendant transferred it to him, *indorsing it in blank.*

It was in proof that the plaintiff held the bond on Thom and the sureties, and never sued thereon until January, 1869; and at the time of the institution of the suit application was made by the plaintiff, or at his instance, to Stafford, the payee of the bond on Thom and his sureties, without the privity or consent of the defendant, to indorse the same to the defendant, so as to complete the claim of plaintiff and for the purposes of this suit. Stafford, as requested, indorsed the bond without recourse on him, whereupon suit was brought against the obligors and this defendant to Spring Term, 1869. The plaintiff after entering a discontinuance, as to the defendant, prosecuted that case to judgment against the obligors in the bond, obtaining judgment at Fall Term, 1870, for $643.30, with interest. Upon this judgment execution issued, which was returned by the Sheriff, "No goods or chattels, lands or tenements of the debtors or either of them wherewith to satisfy this execution, to be found"; whereupon the plaintiff, on 30 May, 1871, caused a written notice to be served on the defendant of his failure to make the money out of Thom and his sureties, and notifying him, the de-
(152) fendant, that he was looked to to pay the same. Shortly after the service of this notice this suit was instituted.

It appears that the bond is lost, and on the trial in the Court below both parties were allowed to speak of the same and the indorsement thereon without its being produced. The defendant insisted that his indorsement, which is the gist of the action, was made merely to pass the title, and without any purpose to be liable for its ultimate payment, and

that it was so understood and agreed at the time of the indorsement; and the defendant requested the Court, in framing the issues to be passed upon by the jury, to submit one involving this particular matter. This was objected to; and his Honor, holding that it was inadmissible to explain by parol testimony the written indorsement, declined to submit such issue. Defendant excepted. Afterwards, during the trial, the defendant offered himself as a witness to prove that the intent and understanding, when his indorsement was made, was that he was not to be liable, except as against confiscation. To this the plaintiff again objected, which being sustained by the Court, the defendant excepted.

His Honor submitted certain issues to the jury involving questions of fact, reserving the question of law as to whether the defendant was bound as indorser or guarantor; and if bound as guarantor, then whether he was or was not discharged by the laches of the plaintiff. On the issues submitted, the jury found as follows:

1. That the value of the note surrendered to the defendant was $533.33, or 12 per cent. added, $107.32.

2. That the principal obligors (in the Thom bond) became insolvent two years after the surrender.

3. That the plaintiff first demanded payment of the bond from Thom one year after the surrender.

4. That the defendant did not request the plaintiff to press the original obligors.

Upon consideration, the Court was of opinion upon the questions reserved: first, that the defendant was not liable as indorser; second, that he was liable as a (153) guarantor; third, that in law the defendant is not discharged by the laches of the plaintiff.

The defendant being dissatisfied with the charge of his Honor, and his rulings in rejecting the evidence before stated, and the verdict of the jury, etc., appealed.

Dillard & Gilmer, for appellant.
Scott & Caldwell, contra.

RODMAN, J. The defendant offered to prove that at the time when he wrote his name on the back of the note of Thom and others and delivered the same to the plaintiff, it was un-

derstood and agreed between them that such indorsement should have no other effect than to assign the property in the note to the plaintiff, and to guaranty him against its confiscation by the United States. His Honor, the Judge below, excluded the evidence, on the ground that parol evidence was inadmissible to alter or explain a written instrument.

The rule upon which his Honor acted is unquestionable; but we think he was mistaken in its application, and that both on reason and authority the evidence was admissible. No action can be maintained upon a mere signature of a name without a reference to some written contract which it was intended to authenticate, except on the supposition that there is written out what the signature authorized to be written out as authenticated by it. What that is which is so authorized to be written out is sometimes matter of law and sometimes a question of fact as to what authority the signature was intended to convey. When the payee or regular indorsee of a negotiable note writes his name on the back of it, as between him and a subsequent *bona fide* holder for value the law implies that he intended to assume the well-known liabilities of an indorser, and he will not be permitted to contradict the implication; so if the drawee in a bill of exchange writes his name across the face of it, without more, the law authorizes such a holder to write above the signature the con-
(154) tract which it implies under the circumstances, and such contract, being in writing by authority of the signer, cannot be altered or explained by parol.

But this rule does not apply between the original parties to a contract which is not in writing, although there be the signature of one or more parties to authenticate that *some* contract was made. In such cases it must always be a question of fact what contract the signature authorizes to be written above it; in other words, what was the agreement of the parties at the time it was written.

There is no written contract to be altered; the whole (except the signature, which by itself does not make a contract) exists in parol, and must be established by such proof. It may be admitted, and the authorities seem that way, that when a person, other than the payee or indorsee of a note, writes his name across the back of it, after it has been delivered by the maker, and not as a part of the original transaction, and de-

livers it for value to another, the law presumes that he intended to become a guarantor of the note. But this presumption is not one of law, but of fact merely, and may be rebutted. In *Love v. Wall,* 8 N. C., 313, a second indorser of a promissory note was allowed, in defense of an action brought against him by the first indorser, to prove an agreement different from what the law presumes from the order of their names on the back of the instrument, and that in fact they were jointly liable as sureties for the maker. In *Gomez v. Lazarus,* 16 N. C., 205, it was taken as clear that the acceptor of a bill of exchange, as between him and an indorser, might prove that they were joint sureties for the drawer. In *Davis v. Morgan,* 64 N. C., 570, the payee of a note, who had written his name in blank across the back, was permitted to prove that such signature was not intended as an indorsement, but as a receipt of payment from the maker. In *Sylvester v. Downer,* 20 Vt., 855, the Court held that by an indorsement in blank the defendant became presumptively bound as a joint promisor. But *Redfield, J.,* adds: "But the signature being blank, he may, undoubtedly, show that he was not understood to assume any such obligation." See to the (155) same effect, *Clapp v. Rice,* 13 Gray, 403; see also *Perkins v. Catlin,* 11 Conn., 213, and numerous other cases cited in a note on page 121 of 2 Parsons Notes and Bills.

PER CURIAM. *Venire de novo.*

Cited: Hill v. Shields, 81 N. C., 254; *Comrs. v. Wasson,* 82 N. C., 313; *Hoffman v. Moore, Id.,* 316; *Smith v. Haynes, Id.,* 450; *Bank v. Pegram,* 118 N. C., 674.

THE PEOPLE OF THE STATE OF NORTH CAROLINA on the relation of JOHN M. CLOUD v. THOMAS J. WILSON.

1. Where A was elected Judge of the Superior Court and declined to accept the office and never qualified: *Held*, that there was a vacancy within the meaning of sec. 31, Art. IV, of the Constitution, and the Governor had the power to fill such vacancy by appointing a successor.

2. The General Assembly has no power to order an election to fill such vacancy, and any law for that purpose is unconstitutional and void.

3. The words "until the next regular election," in sec. 31, Art. IV, of the Constitution, mean until the next regular election for the office in which a vacancy has occurred.

READE, J., *dissenting.*

(*Clark v. Stanly*, 66 N. C., 59; *People v. Bledsoe*, 68 N. C., 457, cited and approved).

QUO WARRANTO, contesting the right to the office of Judge of the Eighth Judicial District, tried by consent by *Kerr, J.*, at Fall Term, 1874, of ORANGE, having been removed by consent from YADKIN.

The following are substantially the facts submitted to his Honor, and upon which the judgment appealed from was founded:

At an election held in April, 1868, D. H. Starbuck was elected to the office of Judge of the Eighth Judicial District, he being at and before his said election the District
(156) Attorney of the United States for the District of North Carolina and in the active discharge of the duties of his said office, and that he so continued until 24 August, 1868, when he formally, by letter to the Governor of the State, declined to accept the said office of Judge.

On 1 July, 1868, the Supreme Court of North Carolina, under the former Constitution, adjourned; and that on the same day, Hon. R. M. Pearson, Chief Justice-elect, and Hon. E. G. Reade and Hon. R. P. Dick, Associate Justices, elected at the election in April, 1868, after having been qualified by taking the oaths of office, proceeded to superintend the allotment and classification of the persons elected as Judges of the various Judicial Districts of the State; and in said allot-

ment D. H. Starbuck, the Judge-elect for the Eighth District, was assigned a term of eight years.

On said 1 July, 1868, when said classification was made, the Hon. W. B. Rodman and the Hon. Thomas Settle had qualified as Associate Justices of the Supreme Court of North Carolina by taking the oath of office, but were not present at the said classification. That at the time of the said classification and allotment of terms, D. H. Starbuck had not been commissioned as a Judge, nor had he accepted the said office, and never was a Judge of the Superior Court.

After the letter of Starbuck was received by the Governor, and he formally declined to accept the office of Judge, his Excellency, W. W. Holden, Governor of the State of North Carolina, appointed and commissioned the relator, the said J. M. Cloud, a Judge of the Eighth Judicial District, in said commission directing the relator to enter upon said office and discharge all the duties thereof until his successor shall be duly elected according to the Constitution and laws of the State. That the relator entered upon the discharge of the duties of said office, after being duly qualified, and continued in charge thereof till the defendant, T. J. Wilson, assumed the execution of the duties of said office against the relator's consent.

The defendant, the said T. J. Wilson, was duly elected, at a regular election held on the first Thursday (157) of August, A. D. 1874, Judge of the said Eighth Judicial District, in pursuance of an act of the General Assembly of North Carolina entitled "An act concerning the election of certain officers," ratified 13 February, 1874; and that he was commissioned by his Excellency, C. H. Brogden, Governor of the State, as a Judge of the Superior Court of the Eighth Judicial District on 22 August, A. D. 1874, and that day was qualified as Judge by taking the oaths of office, and since that time has been in the active discharge of the official duties of Judge in and for said district.

His Honor, being of opinion with the defendant, adjudged that the relator, John M. Cloud, was not entitled to the office of Judge of the Eighth Judicial District, as claimed in his complaint, and that T. J. Wilson, having been duly elected under said act of the General Assembly, ch. 118 of the Laws of 1873-'74, and commissioned by the Governor, was the law-

ful and rightful Judge of the said Eighth Judicial District and entitled to hold the office.

From this judgment the relator appealed.

McCorkle and *Batchelor,* for appellant.
Graves and *J. W. Graham, contra.*

PEARSON, C. J. D. H. Starbuck, at the first election after the adoption of the Constitution, was elected Judge of the Eighth Judicial District; he did not accept the office, and declined to qualify. Thereupon the Governor appointed the relator to fill the vacancy. The question is, Was this a vacancy which the Governor had power to fill? One of these conclusions must be adopted:

1. On the refusal of Mr. Starbuck to accept, the General Assembly had power to order a special election for a Judge of that district; in the absence of a grant of this power to the General Assembly by the Constitution this conclusion must be rejected.

2. This is *casus omissus* in the Constitution; and (158) that instrument is so defective as to have provided no way to fill the office, so that the administration of the law in a judicial district must stop should it so happen that the person elected Judge should decline to accept, or dies before he qualifies and takes out his commission. This conclusion must be rejected.

3. We adopt the conclusion that, although Mr. Starbuck declined to accept and did not qualify and take his commission, a vacancy did occur in the office. By an unexpected event there was no one to fill the office; thus, for all practical purposes the office was vacant, and it can make no difference whether Mr. Starbuck declined before or the moment after he qualified, or whether he was eligible to the office; for, taking it in either of the three ways, there was the same mischief: no one to administer the laws in that judicial district, and to avoid this detriment to the public welfare the power to fill vacancies is conferred upon the Governor. The Act of 1873-'74, ch. 118, directs an election for Judge in the Eighth Judicial District on the first Thursday in August, 1874, which was a regular election day for members of Congress,

members of the General Assembly, and some other State officers, and was also regular election day for the Judges of the Superior Court belonging to the short term.

Under this statute, Mr. Wilson was elected by a vote of the people of the Eighth Judicial District. He qualified and, in spite of the protestation of the relator, took possession of the office. The question is, Had the General Assembly power to order the election? This depends upon the construction of Art. IV, sec. 31: "All vacancies occurring in the offices provided for by this article shall be filled by the appointment of the Governor, unless otherwise provided for, and the appointees shall hold their places until the next regular election."

It is settled that the words "otherwise provided for" mean otherwise provided for by the Constitution. *Clark v. Stanly,* 66 N. C., 59; *People v. Bledsoe,* 66 N. C., 457.

The question now is, What is the meaning of the words "until the next regular election"? Taken by themselves they are too indefinite to have any particular (159) meaning; as they cannot stand alone, it is the province of the Court to find, by the rules of construction, other words to support them, that is, to find a definite meaning.

I. It is suggested the addition of the words "for members of the General Assembly" would fix a definite meaning. That is true. But what warrant is there for adding these words? We know of no rule of construction to justify it; there is no association of ideas by which the election of *judicial* officers is connected with the election of members of the General Assembly. There is as much, if not more, reason for making the sentence read, "until the next regular election for justices of the peace," that being a judicial office. It is unnecessary to say more upon this view of the question. Indeed, after the consideration of the matter, which the appointment of Judge Cloud gave rise to, in connection with election for members of the General Assembly in 1872, the position has by general consent been abandoned as untenable, and was not pressed in the argument before this Court.

II. It is suggested that the addition of the words "for Judges of the Superior Court" will fix a definite meaning. This seems to have been the construction adopted by the General Assembly in the act above referred to. It is obvious that

the addition of these words, so as to make the sentence read, "until the next regular election for Judges of the Superior Court," does not meet the whole question. For the section under consideration embraces all vacancies in the judicial department, except those otherwise provided for by the Constitution, and includes the Justices of the Supreme Court, Clerks of the Superior Court and Solicitors, as much as the Judges of the Superior Court; so, to make the sentence full, it must be made to read, "until the next regular election for Justices of the Supreme Court in respect to vacancies occurring in the office of Chief Justice or any one of the Associate Justices, for Clerks of the Superior Court in respect to a vacancy occurring in the office of a Superior Court
(160) Clerk, and for Solicitor in respect to vacancies occurring in respect to the office of a Solicitor, and for Judges of the Superior Court in respect to vacancies occurring in the office of a Superior Court Judge."

It would seem this was the construction adopted by the General Assembly in respect to Justices of the Supreme Court, from the omission to provide for the election of two Associate Justices of the Supreme Court to take the place of two who now hold the office under the appointment of the Governor, to fill vacancies. We think this construction the true one in respect to Justices of the Supreme Court, Clerks of the Superior Court and Solicitors, because elections are to be held at *one time* for *all* of the members of the Supreme Court, and so as to the Clerks and Solicitors respectively. But in regard to the election of the Judges of the Superior Court this is not the case. There is another section of Art. IV which raises the question and calls for a change in the words, which it is suggested should be added. Sec. 26: "The Judges of the Superior Courts elected at the first election under this Constitution shall after their election, under the superintendence of the Justices of the Supreme Court, be divided by lot into *two equal classes*, one of which shall hold office for four years and the other for eight years." Here is an express provision by which the Judges of the Superior Courts are divided into two equal classes, one class to be elected every four years. Whether this provision will effect any important purpose it is not for us to say. It is ordained,

and it is the duty of the Court to give effect to it, and to see that it is not departed from or evaded. No construction of the Constitution can be sound which defeats an *express provision* of that instrument: such is the effect of the construction contended for. We have eight of the Judges, instead of six, elected at one time, and may have nine or ten, or the whole twelve, according to the result of accidents. To preserve these two equal classes, and to have an election for six of the Judges of the Superior Court held every four years, it is necessary to modify the additional words suggested, so as to make the section read, "until the next regular (161) election for Judges of the class in which a vacancy has occurred."

This construction, which we adopt in reference to all judicial officers, may be expressed by the use of a very short ellipsis, so as to make the sentence read, "The appointees shall hold their places until the next regular election *for the office* in which a vacancy has occurred." This construction makes everything fit—there is no jar or disturbance of any part of the instrument.

In our case, the office which had become vacant belongs to the second class, to-wit, that of the Judges to whom was allotted a full term. It follows that the regular election for the office is not to be held until 1878, at which time the terms of the Judges of the second class expire, and that the act of the General Assembly under consideration, which attempts to hasten the time for the election of a Judge of the Eighth District, violates the Constitution.

It was urged on the argument, "By this construction the appointee of the Governor may hold office, as in this instance, for many years, whereas the general policy of the Constitution is to have frequent elections." It is "not ours" to conjecture the considerations which caused a provision by which the appointee to fill the office of Judge in case of a vacancy holds until the next regular election for the office, or for the want of a provision by which a vacancy in the office of Judge of the Superior Court can be filled by an election of the people; suffice it, there is no such provision. The term of office for a Judge, elected by the people, is fixed at eight years, and there is no provision for filling a vacancy by an election. As

another objection to this construction, it was urged, "Other parts of the Constitution, to-wit, secs. 30 and 34 of the same Art. IV, 'Judicial Department,' in providing for filling vacancies, use the words, 'for the unexpired term'; and if the words 'until the next regular election' are to have the same meaning, why are not the same words used?" The ob-
(162) jection is plausible, but the reply is, the Constitution cannot be held up as a model of precision in language, and the duty of the Court is to declare the meaning, whether it be expressed in one set of words, or in other equivalent words. For illustration, sec. 30, "in case of a vacancy existing for any cause," etc.; sec. 34, "when the office shall become vacant," etc.; here the same meaning is expressed in different words; so the use of different equivalent words does not exclude the construction that the same meaning was intended. But allowing that the change of words is an objection to the construction adopted, it is weighed down by the fact that any other construction would nullify and put at naught the provision by which the Judges of the Supreme Court are divided into two classes; and by the further fact, that should a Judge of a district, having at the outset the long term, be elected at the time the Judges of the other class are elected, the question will arise, Does this Judge elected out of his class hold for eight years or only for the unexpired part of the term? If the four-year classification is entirely destroyed of the latter, the classification is restored in that instance, but is open to other disturbances occurring by vacancies, and we have the anomaly of a Judge elected by the people to fill a vacancy, for four years or other less time, which is in conflict with the provision that the term of office shall be eight years. There is the further objection, the election of a Judge out of his class may come on unexpectedly; as if a Judge out of the class die or resigns, say twenty days before the regular election for Judges of the other class, there will be no reasonable time for making a selection of candidates, but the election must be made or the district will have no Judge. The fact that this contingency was not provided for shows that it was not the intention to have an election by the people *to fill the vacancy* in the office of Judge. This construction is put beyond all doubt by reference to other parts of the Constitution, by which provision

is made in so many words for the election of other less important officers; if the election comes off within thirty days after the vacancy, the appointee of the Governor is to hold until the next general election. Art. III, sec. 13. (163) No provision of the kind is made in respect to an election to fill a vacancy for the office of a Judge out of his class. Thus we are forced to the conclusion that no election of a Judge out of his class was contemplated. We declare our opinion to be, that the defendant, Thomas J. Wilson, is not entitled to the office of Judge of the Eighth Judicial District, and that the relator, J. M. Cloud, is entitled to the office. There is error. Judgment below reversed. Let judgment be rendered according to this opinion.

READE, J., *dissenting.* "All vacancies occurring in the offices provided for by this article of the Constitution shall be filled by the appointment of the Governor, unless otherwise provided for, and the appointees shall hold their places until the next regular election." Art. IV, sec. 31. The meaning of "next regular election" is the question to be settled.

The adjective "next" is evidently used to qualify "election," so as to make it mean the *first,* as distinguished from a remote election. It means the *first election in point of time.* The adjective "regular" is used to qualify "election," so as to distinguish it from some other kind of election. It is therefore necessary to ascertain what are the several kinds of elections designated in the Constitution. There are two, and only two, kinds of elections designated or contemplated in the Constitution: *regular* elections and *special* elections. Regular elections are those by which the offices are originally and continuously filled, according to "stated and established rules," at "periodical times." Web. Dict. Special elections are those by which the offices are filled in cases of accident. The usual election for members of the General Assembly, on the first Thursday in August every two years, is an instance of regular elections. An election to fill a vacancy occasioned by the death of a member, at such time as may be appointed, is an instance of special elections. It is a useful inquiry, Why is it that the Governor is allowed to appoint a Judge in any case? The people elect members of the General (164) Assembly, whose term is two years, and if a member dies, making a vacancy, the Governor does not fill the va-

cancy by his appointment, but the people meet again and elect a new member. And so the people elect a Judge, whose term is eight years; and yet if a Judge dies, making a vacancy, the people do not meet again and elect a new Judge, but the Governor appoints. Why is this? Why is the Governor let in to appoint in one case and not in the other?

The people are the elective power in both cases; one is just as important as the other, and they will not allow the Governor to appoint in one case for a single day, and yet they do allow him to appoint in the other for years. The difference is founded on *convenience,* and on that alone. Members of the General Assembly represent a county or a small district; and it is but a little trouble or expense for the people to make a new election upon short notice. And therefore there is no necessity that the Governor should appoint their representatives or any *county* officer; and he is not allowed to do so. But the Constitution provides that all the twelve Superior Court Judges shall be elected, not by a county, not by a district, but by the whole State (unless thereafter altered). And a special election to fill a vacancy would involve delay to notify the people, to nominate candidates, to canvass their merits, and much expense to hold and certify the election. And so, for *convenience,* the appointment to fill the vacancy was given to the Governor, instead of being reserved by the people.

It is also a useful inquiry: For how long a time would the people be *likely* to part with this important elective power? As they parted with it temporarily to suit their *convenience,* they would resume it as soon as convenient. The next inquiry is, Is such *convenient* time indicated in the Constitution? It is the "stated, established, usual period" when the people meet together for the *first* time, after the vacancy occurs, to vote for Judges of the Superior Courts. Then it is as convenient for them to fill a vacancy resulting from accident as from the expiration of a term. And it is
(165) just as convenient for them to vote for seven as for six.

If, then, we use "regular" in the sense of usual or established election, we have still to determine what is the usual or established times for elections of Judges by the people. The Constitution provides that twelve Superior Court Judges

shall be elected by general ticket, and shall hold their offices for eight years from 1870. That would make the "usual, established," or what is the same, the "regular," elections come off in 1878, 1886, and so on every eight years. But there was a further provision that one-half the Judges elected at the first election should hold their first terms for only four years; the effect of which was to have an election every four years for six Judges, instead of an election every eight years for twelve Judges, evidently for the purpose of securing a continuous and uniform practice and administration of the law, and at the same time popularizing the system and keeping the Judges and the people close together, with a frequent reminder to the Judges of their responsibility to the people, and a frequent opportunity to the people to make them feel their responsibility. Whether such a policy is wise or unwise, I express no opinion, not because I have none, but because this is not the place to express it. With this policy in view, and in view of the fact that the people are the electors of Judges, are we not to suppose that the Constitution would have so provided that as much as possible of the terms of Judges should result from the popular vote? When it is clearly intended that the Judgeship of a district shall be held eight years under the election of the people, can it be that in case of accident it should be held one year under the election of the people, and seven years under the appointment by the Governor? Why should the accidental vacancy and the appointment by the Governor have any other effect than to fill the office until the legitimate electors can fill it when they come together at the usual or regular time and places of electing Judges, and without the inconvenience of being called together in a special election? Beyond all question, the people are to elect the Judge, at some future (166) usual or regular election for Judges. There was such regular election in 1874, four years (six) after the vacancy occurred, and was filled by the appointment of the plaintiff, and there will be another regular election for the same purpose in 1878. At which of these regular elections for Judges are the people to be permitted to vote for a Judge of that district? The language is "at the next regular election." Does that mean the next regular election in 1874, or does it mean the next, after the next, in 1878? It certainly was just as *con-*

venient for them to vote to fill *that* vacancy at the time when they voted to fill six other vacancies in 1874, as it can be for them to vote to fill it when they vote to fill six other vacancies in 1878. Nor can the alteration by statute, since the Constitution, to vote by districts, make any difference. It is insisted that we ought to read the Constitution as if it were "next regular election *for that office.*" If that addition would not alter the meaning, why make it? If it would alter the meaning, where is the precedent for changing language to injuriously affect a popular right? In whose favor must doubtful language be construed? Not in favor of the appointing power of the Governor: he has no interest in it; not in favor of the appointee, for although he has an interest, yet it is subservient to the public, and doubtful language must be solved in favor of popular rights. Nothing is better settled, or more important to be maintained, than that no one ought to exercise the duties of an office to which his title is doubtful, and no one rightfully in office ought to exercise a doubtful power. The Legislature itself ought not to exercise a doubtful power, and it is upon the supposition that they duly considered the question of power, and determined it in favor of its exercise, that the courts feel themselves bound by their construction unless in cases *plain* to the contrary. Every *doubt* in everything is solved in favor of popular rights; to this there is no exception. Cooley Cons. (167) Lim., 36, 37, 73, 74, 182, 186.

The Constitution having provided for an election of Superior Court Judges in 1874, and that being the *next* regular election for Judges after the vacancy, and the people having parted with the right to fill the office only temporarily, and for *convenience,* and it being reasonable and fundamental that the power should be resumed as soon as *convenient,* it would seem to follow that the election of the defendant in 1874 was proper. An argument of some force against this view is that judgeships should be for the longest time, and that a reasonable consideration of the interest of the appointee would not call him from his practice for a few months or a few years; and that no good lawyer would accept such appointment. But an analogy unfavorable to this argument was the appointment of Judges under the old *regime* by the Governor until the next General Assembly, which was some-

times only for a few months, and could not exceed two years. And then the General Assembly resumed the elective power, and sometimes used it with crushing, not to say cruel, effect upon the appointee, under the idea that the public good, or some other consideration, was paramount. There is a general idea that to fill a vacancy is to fill it full, as you would a barrel, so that there is nothing more to do. That is true, where the electing power to fill the office originally is the same power that fills the vacancy, as where the people elect a member of the General Assembly, and he dies, and they fill the vacancy. They fill it full, and there is an end. But when the appointing power is not the elective power, then it reverts to the elective power as soon as it can be conveniently exercised, unless the contrary clearly appears. And doubts ought to be solved in favor of the reversion.

It is objected that this construction would disarrange the provision that the Judges of the Superior Courts are to be divided and kept in two classes, six and six, to be elected every four years: for if eight are elected in 1874, then only four will be elected in 1878. *Non sequitur.* That would be so if the two Judges elected to fill va- (168) cancies in terms which end in 1878, were elected not only to fill the *vacancies,* but for four years of the *next term.* That would be an enormity for which I remember no precedent, either to appoint or elect an officer not only for the unexpired term, but for one-half of the succeeding term. A Senator in Congress is elected for six years; but if elected to fill a three years' vacancy, he does not fill *that* three years and three years of the *succeeding* term. So here, when two Judges are elected in 1874, to fill vacancies in terms which expire in 1878, *their* terms expire in 1878. They fill *vacancies,* and not *terms.*

And it is said that if the construction for which I contend is adopted, *i. e.,* that the Governor is to appoint until the next regular election for Judges of the Superior Court, and then the people are to elect, to fill the remainder of the vacancy—then if the vacancy should happen just before the election, say twenty days, so that no election could be held, the vacancy would remain for four years. *Non sequitur.* The Governor can appoint to fill any vacancy. He could fill the vacancy for twenty days, and then, if the people failed to elect, either

his appointee would hold over as in *Battle v. McIver,* 68 N. C., 467, or he could again appoint to fill the vacancy occasioned by the failure of the people to elect.

This construction of "next regular election" would seem to be the true one, if considered without the light of the legislative, executive and popular action; but with the aid of these, there would seem to be no doubt. The Legislature has so construed it to mean the election of 1874. The popular voice so construed it, and the Executive so construed it and commissioned him. If I had doubts I should yield them. It is not pretended that this construction affects the office of any member of this Court. It was admitted on the argument that it does not. The regular elections for Supreme Court Judges are every eight and not every four years. There has not been, and there cannot be, any election for any (169) Judge of the Supreme Court until 1878. I mention it only to exclude the conclusion that the decision is insensibly biased thereby. I dissent from the decision.

PER CURIAM. Judgment reversed.

Cited: Hargrove v. Hilliard, post, 170; *R. R. v. Comrs., post,* 490; *Jones v. Jones,* 80 N. C., 131; *Worley v. Smith,* 81 N. C., 307; *S. v. Norman,* 82 N. C., 689; *Ellison v. Raleigh,* 89 N. C., 133; *Rhodes v. Hampton,* 101 N. C., 633; *Ewart v. Jones,* 116 N. C., 574; *S. v. Turner,* 119 N. C., 846; *Hoskins v. Cathey, Id.,* 662; *Lyon v. Comrs.,* 120 N. C., 242; *Rodwell v. Rowland,* 137 N. C., 626, 627, 628, 641, 644-5-6, 649.

THE PEOPLE OF THE STATE OF NORTH CAROLINA upon the relation of TAZEWELL L. HARGROVE, Attorney-General, v. LOUIS HILLIARD.

An action to try the right of an incumbent to any public office may be brought by the Attorney-General upon his own information or upon the complaint of any private party.

(See syllabus in the preceding case, *Cloud v. Wilson*).

QUO WARRANTO to try the right to the office of Judge of the Second Judicial District, tried before *Watts, J.*, at the January Term, 1875, of WAKE.

The substantial facts, pertinent to the point decided, are:

That at the election in April, 1868, the Hon. Edmund W. Jones was duly elected Judge of the Superior Court of the Second Judicial District, was commissioned and qualified; that in April, 1871, he resigned, and the Governor of the State appointed the Hon. William A. Moore to the said office, who was also duly qualified by taking the oaths of office, and that he discharged the duties of the office until 7 September, 1874. That the defendant usurped said office of Judge of the Second Judicial District, and held the Court in the county of Hertford on 7 September, 1874, and the various courts of the circuit since that time.

The defendant demurred to the plaintiff's complaint, for the reason that W. A. Moore was a necessary party. The Court overruled the demurrer, and the defendant answered: insisting that he was duly elected Judge of (170) the Second Judicial District, according to law, on 6 August last, for the residue of the unexpired term of said office.

The plaintiff filed a demurrer to the answer of defendant for insufficiency, thus raising directly the issue of title to the office, which, after argument, was decided in favor of the plaintiff. Appeal by the defendant.

Batchelor & Son, Smith & Strong, Carter and *Cox*, for appellant.

Haywood, Fowle and *Batchelor, contra.*

PEARSON, C. J. The main question is disposed of in *Cloud v. Wilson, ante*, 155. Passing by the question whether

the objection for want of parties was not waived by putting in an answer and amending the pleadings after the demurrer was overruled, we are of the opinion that the action is not brought on the relation of the Attorney-General. C. C. P., sec. 366, authorizes the action to be brought by the Attorney-General upon his own information, or it may be brought upon the complaint of any private party, as was done in the case referred to. The action is well brought in either way. The only difference is that judgment is rendered *only* in respect to the right of the defendant, sec. 370.

PER CURIAM. No error.

Cited: Saunders v. Gatling, 81 N. C., 301; *S. v. Norman,* 82 N. C., 689.

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(171)

FRANCIS W. KERCHNER v. JOHN REILLY.

1. Where one P had been selling goods on his own account and failed, and afterwards K, the plaintiff, under a written contract, furnished P goods to sell as his agent; and the defendant, a sheriff, having an execution against P in favor of one M, seized the goods as the property of P: *Held,* that a conversation between P and M tending to show that M knew that P was K's agent, was competent evidence in a suit against the Sheriff for conversion of the goods.

2. It is too late to object to a deposition on the trial, because it was taken after issue joined, and the Clerk, instead of the Judge presiding, named the commissioner therein. The objection should have been taken at the time the depositions were passed upon by the Clerk. And when a deposition lies on file for a reasonable time up to the trial without objection, it is presumed to have been passed upon, and all objection for irregularity is waived.

3. P contracts with K as follows: "And I further agree that in the event that I shall not sell any of the goods, etc., shipped and delivered to me by the said K, that I will not make any charge thereon, and that I will hold the same as his property and as his agent as aforesaid, subject to his order, and to be disposed of in any manner that the said K shall direct: *Held,* that P had no estate in the goods whatever, and that an action for their conversion was properly brought by K.

4. Where one who sold goods on his own account failed and afterwards sells goods at the same place as agent for another, it is proper that he should in some way notify the public of the change in the nature of his business: *It may be,* that if no such notice

is given, a person who ignorantly gives credit to the agent in the belief that he is acting upon his own account, would be entitled to set up such a defense against the principal. Such notice need not be necessarily given by publication in the newspapers; any equivalent manner of making the same public will suffice.

(*Mason v. Williams*, 66 N. C., 564, cited and approved).

ACTION in the nature of trover, tried at Spring Term, 1874, of CUMBERLAND, by *Buxton, J.* The necessary facts are fully stated by *Justice Rodman.*

On the trial below there was a verdict and judg- (172) ment for the plaintiff, from which defendant appealed.

B. Fuller and *Merrimon, Fuller & Ashe,* for appellant.
Hinsdale and *McRae, contra.*

RODMAN, J. The case, as far as it is material now to state it, is very briefly this: One Powers, in partnership with another person, and afterwards on his own account alone, had been selling goods as a merchant in Fayetteville, and the firm and he individually became insolvent. Afterwards the plaintiff, who is a merchant in Wilmington, under a written contract with Powers, furnished him goods to be sold on terms which in effect made Powers the agent of the plaintiff for their sale. These goods were placed in the same storehouse in which Powers had previously done business on his own account. The defendant, being Sheriff, and having an execution in favor of Moore against Powers, and having been indemnified by Moore, seized and sold the goods so found in the possession of Powers, which is the conversion complained of.

1. The first exception of defendant is upon the admission of the testimony of Powers to a conversation between him and Moore, before the receipt of the goods from the plaintiff, tending to prove that Moore knew that Powers was going to continue in the storehouse and sell goods of the plaintiff as his agent. We concur with the Judge below that the evidence was competent. To show that it had a legitimate bearing, it is necessary to consider the defense to which it applied. It was contended for the defendant that, seeing the goods in the possession and apparent ownership of, and that these facts amounted to a representation by Powers, he had a right to suppose that the goods were really his, and that the business

he was then carrying on was a continuation of his former business, and, like that, on his own account. And that as the plaintiff, knowing the former business, and the insolvency of Powers, permitted him to make this appearance of ownership,

(173) he (the plaintiff) became thus a party to the representations, and was estopped to deny them as to any person who had acted on them and would be prejudiced if they were not true. This doctrine is true as a general one, with, however, the material qualification that the person acted on the supposed representations, believing that they were true, and was deceived by them. For it is obvious that if the defendant knew that the goods were in fact not the property of Powers, but of the plaintiff, he had no right to act on the false representations of Powers, and by doing so he became *particeps fraudis*. He was not deceived and could not be injured in a legal sense. Bigelow on Estoppel, 473 and 480. *Mason v. Williams,* 66 N. C., 564.

A closely analogous case may arise on the dissolution of a partnership, in which the law is well settled. If a customer of a late firm, who has had no actual notice of the dissolution, receives from one of the late partners a note in the partnership name, the other partner is bound; but not if the holder knew of the dissolution, and that the other partner had no right to use the partnership name and was attempting a fraud upon the other.

For this reason we think the evidence in question, and all the other evidence tending to show that Moore had notice that the plaintiff was the owner of the goods, was competent. And we think that, under the circumstances, it was not material whether the Sheriff had notice or not, although there was evidence that he did not have notice before the levy. A sheriff who levies under an indemnity from a plaintiff in the execution stands in the shoes of the plaintiff as to any defense he can make, and must look to his indemnity for relief.

2. Exception upon the admission of the deposition of Russell. This was taken after issue joined, upon a commission in which the Clerk of the Court had inserted the name of one Gray as the commissioner, when the Judge had not named any commissioner in his order for taking the deposition. The question is governed by Rev. Code, ch. 31, sec. 63, which enacts that a party may take depositions *de bene esse* be-

fore as well as after issue joined, and that in the (174) former case the Clerk shall name the commissioner. It is contended that this language raises an implication that in the other case he must be named by the Judge. We are inclined to think that the objection was well founded, though probably the general practice has been the other way. But we think it was not open to the defendant to take it when the deposition was offered on the trial. The act above cited directs the Clerk to pass on all depositions taken on commission and returned to him, and if passed on without appeal they become legal evidence if the witness be competent.

This provision is a very useful one; its obvious purpose is to prevent surprise at trials. It does not appear that the deposition was formally passed upon, but there was no motion by defendant to suppress it for irregularity, and when a deposition lies on file for a reasonable time up to trial, without objection, it must be presumed to have been passed on, and all objections for irregularity are waived.

3. Defendant requested the Judge to instruct the jury that plaintiff could not recover, because under his contract with Powers he did not have the immediate right of possession. The Judge refused so to charge, and the defendant excepted.

We concur with his Honor. It is not doubted that to maintain an action of trover the plaintiff must have a right to immediate possession. And it is well enough to look at the reason of the rule, in order to see when it applies. If A lets his horse to B for a month, and during that time C converts it, if A could recover the full value of the horse he would recover damages which partly belong to B.

We think that, upon the contract in evidence, Powers had no estate in the goods whatever. He had a bare possession, determinable at any time upon the demand of the plaintiff. This is the language of the contract. "And I further agree that in the event that I shall not sell any of the goods, etc., shipped and delivered to me by the said Francis W. Kerchner, that I will not make any charge thereon, and that I will hold the same as his property, and as his agent (175) as aforesaid, subject to his order, and to be disposed of in any manner that he, the said Kerchner, shall direct."

4. We concur with his Honor that Powers was not a partner of the plaintiff in the goods. There was no community

of profits. The plaintiff had no interest in any profits Powers might make.

5. We also concur that Powers was not a tenant in common; and

6. That the contract was not a sale of the goods.

These two propositions need no further remark than what has been said above.

7. As to the question of what notice was necessary that Powers was acting as agent of the plaintiff.

It is contended for the defendant that publication in a newspaper was absolutely necessary, or else the plaintiff's goods intrusted to the possession of Powers became liable to execution at the instance of his prior creditors. At least, as we conceive, the proposition must reach to that extent to be applicable to this case.

The learned counsel for the defendant has referred to no authority to that effect. When one who has sold goods on his own account becomes insolvent, and afterwards sells as agent of another, it is proper that he should, in some way, notify the public of the change in the nature of his business. It *may* be that if no such notice is given, a person who ignorantly gives credit to the agent in the belief that he is acting upon his own account would be entitled to set up such a defense against the principal. But, however that may be, there is no such case here. Morris' debt was incurred before Powers received the plaintiff's goods. He gave no credit upon any apparent ownership of Powers. And even in such a case, we know of no reason why such notice must necessarily be by publication in a newspaper. Any way that is equivalent must suffice, and a notice posted on a tree, in front of the store, and in the store itself, would seem to be sufficient; at least
(176) a Judge could not, as a matter of law, declare it insufficient.

8. We think the sixth prayer for instructions was properly refused, for the reason that the question was not what Powers represented (without the knowledge of the plaintiff) as to the property in the goods, but to whom did the goods in fact belong.

9. We concur with his Honor in his refusal to give the seventh instruction prayed for. Powers was not the agent of the plaintiff to permit the Sheriff to sell the goods, and had no

authority or duty to forbid the sale. Besides, he had previously forbidden it, as far as he could, by disclaiming all title to the Sheriff when they were levied on. There is no error.

PER CURIAM. Judgment affirmed.

Cited: Wasson v. Linster, 83 N. C., 580; *Barnhardt v. Smith,* 86 N. C., 480; *Woodley v. Hassell,* 94 N. C., 160; *Carroll v. Hodges,* 98 N. C., 419; *Hopkins v. Bowers,* 111 N. C., 179; *Brittain v. Hitchcock,* 127 N. C., 401; *Womack v. Gross,* 135 N. C., 379.

CHARLES R. BREWER and wife HETTIE v. THOMAS A. HARVY.

1. To make a gift valid to pass title there must be a *delivery*, either actual or symbolical.

2. *Therefore*, where a father pointed out a colt to his daughter, at the same time saying to her, "That is your property; I give it to you," but retains the possession, no title passed to the daughter.

ACTION to recover possession of a horse and for damages, tried before *Seymour, J.,* at Fall Term, 1874, of CRAVEN.

On the trial below, it appeared that one White, who was the father of the *feme* plaintiff, during his lifetime gave to her the horse in controversy. That at the time of this gift the *feme* plaintiff was only twelve years old, and the horse itself nothing but a colt. The manner of the gift seemed to be this: The father, White, standing in the piazza of his house, in company with the *feme* plaintiff and her mother, (177) pointed out the colt, at the time standing with its mother near by, and told her that it was her property: "I give it to you." That the colt was ever afterwards known as her property by the family and by the neighbors. When her father died the colt was one or two years old, and had never been out of her father's actual possession. That she, the *feme* plaintiff, lived with her father until his death, and with her mother and one Adams, whom her mother subsequently married, at the same place, till Adams carried the said horse

away. That her father while he lived, and her mother afterwards, took care of the horse for her and as her property, until it was sold in August, 1873, by said Adams and wife to the defendant Harvy, while the *feme* plaintiff was away in November.

There has been no administration on White's estate, and the property belonging thereto remains in charge of her mother upon the place her father died. She, the *feme* plaintiff, has since intermarried with the other plaintiff, and is nineteen years old.

Upon this statement of facts, the Court intimating the opinion that the plaintiffs could not recover, on the ground that there had been no sufficient delivery in law, and plaintiffs could not maintain this action for want of title, plaintiffs submitted to a nonsuit and appealed.

N. R. Bryan, for appellants.
Clark & Roberts and *Faircloth & Granger, contra.*

READE, J. A gift is, of course, without valuable consideration; and to make it valid to pass title there must be a *delivery,* either actual or symbolical.

In this case, the owner pointed out a colt and said to his daughter, "That is your property; I give it to you." There was no change of possession. The title did not pass to the daughter. There is no error.

PER CURIAM. Judgment affirmed.

Cited: Medlock v. Powell, 96 N. C., 501.

(178)

JOHN A. LANCE and others v. JOHN V. HUNTER.

A contract to convey land, in consideration that one of the parties should serve in the Confederate army as a substitute during the war, was in aid of the rebellion and, as such, against public policy, and cannot be enforced.

(*Smitherman v. Sanders*, 64 N. C., 522; *Critcher v. Holloway, Ibid.*, 526; *Logan v. Plummer*, 70 N. C., 388; *Clemmons v. Hampton*, 64 N. C., 264; *Leake v. Commissioners, Ibid.*, 134; *Davis v. Commissioners, post*, 441, cited and approved).

ACTION to recover a tract of land, tried by consent by *Henry, J.*, at chambers, in Brunswick, as of Spring Term, 1874.

The case had been referred to J. G. Martin, Esq., an attorney of the Court, to whose report the defendant excepted. Upon the hearing the exceptions were overruled by his Honor and judgment rendered for the plaintiff, from which judgment the defendant appealed.

The material facts are stated in the opinion of the Court.

Busbee & Busbee, for the appellant.
M. E. Carter, contra.

BYNUM, J. The facts of the case are: that Joseph Lance, one of the plaintiffs, in 1863 contracted to sell the land in controversy to J. H. Hunter, the father of the defendant, and gave him a bond to make title upon consideration that he would enter the military service of the Confederate States and serve out the term of the war as a substitute for his son. That Hunter did enter the Confederate army as a soldier; served during the war, and in all things performed his part of the contract. That he has since died, leaving the defendant as his assignee of the contract, and also one of his heirs at law, in possession of the land to recover which this action is brought.

The parties have submitted the case upon the following agreement: "It is agreed that the whole case (179) shall turn upon the validity in law of the said contract; if it is valid, they (the plaintiffs) shall not recover; if it is not valid, they shall recover."

We are relieved from any discussion of the single question thus presented by the numerous decisions of this Court, all

to the same effect; that is, that all contracts such as this were in aid of the rebellion, and, as such, were against public policy and are void. *Smitherman v. Sanders,* 64 N. C., 522; *Critcher v. Holloway, Ib.,* 526; *Clemmons v. Hampton, Ib.,* 264; *Leake v. Commissioners, Ib.,* 134; *Logan v. Plummer,* 70 N. C., 388, and *Davis v. Commissioners, post,* 441.

The difficulty I had was whether, both parties being *in pari delicto,* this Court could lend its aid in restoring the plaintiffs to that possession which they gave the defendant in part performance of the illegal contract. As, however, the contract was void *ab initio,* and as though it had never been, and the plaintiffs have the legal title, it would seem that, upon principle, they are entitled to recover. But there is little in the conduct of the plaintiff Lance that commends it to a just or generous mind. Both the father and the very son whose life was saved, perhaps, by the performance of the contract by Hunter, after the war and the danger are over, now seek to deprive him of a possession acquired at such peril and in such good faith. Most persons of sound morals would rather be the defendant without than the plaintiffs with the land. There is no error.

PER CURIAM. Judgment affirmed.

Cited: Brickell v. Comrs., 81 N. C., 243.

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(180)

STATE v. JOHN HAWKINS.

An appellant, if not allowed by the Court to appeal without security, must file his appeal bond at the term at which the case was tried, or the appeal will be dismissed.

INDICTMENT for a wilful injury to a dwelling-house, tried at Fall Term, 1872, of EDGECOMBE, before *Moore, J.*

On the trial below the defendant was found guilty, and the Court pronounced judgment, from which the defendant appealed. There was no appeal bond filed nor any transcript sent to this Court at the term; nor did the defendant file an appeal bond until 1 December, 1874, when the case was sent up.

The foregoing are all the facts necessary to an understanding of the decision of this Court.

Stamps, for defendant.
Attorney-General Hargrove, contra.

READE, J. The defendant was convicted at Fall Term, 1872, and prayed an appeal, which was granted upon condition that he enter into bond in the sum of $100 with surety. Nothing further appears until December, 1874, when he files a bond with surety for $250, reciting that he had been convicted at Fall Term, 1874, and appealed, etc.

The Attorney-General moves in this Court to dismiss the case, upon the ground that the appeal was not prosecuted in apt time. The motion is allowed.

When an appeal is taken, it is to the *next* term of the Supreme Court; and if not prosecuted by the default of the appellant the appeal is lost; and if without the default of the appellant, his remedy is by application in apt time for a writ of *certiorari,* or for leave to docket the case.

Judgment here against the surety upon the bond for costs.

PER CURIAM. Appeal dismissed.

Cited: Smith v. Lyon, 82 N. C., 3; *S. v. Walker, Id.,* 696; *Wilson v. Seagle,* 84 N. C., 113.

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(181)

COMMISSIONERS OF YANCEY COUNTY v. W. E. PIERCY and others.

The Superior Court has power to strike out an answer whenever it appears to the satisfaction of the Court that it is irrelevant or frivolous under either sec. 109 or sec. 120, C. C. P.

(*Huggins v. Harrison,* 61 N. C., 126; *State v. Lutz,* 65 N. C., 508; *Bryan v. Hubbs,* 69 N. C., 428, cited and approved).

CIVIL ACTION, before *Watts, J.,* at Fall Term, 1874, of YANCEY, brought against the defendant Piercy, who was tax collector, and the sureties on his official bond, for a fail-

ure to collect and pay over the taxes of Yancey County. The defendant set up, as a counter-claim, certain orders drawn upon the Treasurer of Yancey County, which orders the defendant have paid off.

The counsel for the plaintiffs moved to strike out the counter-claim as irrelevant and frivolous, which motion was allowed, and a trial by jury being waived, the Court gave judgment for the plaintiffs. From which judgment the defendants appealed.

Gudger and *A. T. & T. F. Davidson,* for appellant.
M. E. Carter, contra.

BYNUM, J. This is an action against the tax collector of Yancey County for a failure to collect and pay over the taxes for the year 1872. The complaint alleges that the tax lists of the county taxes assessed for that year were regularly made out and delivered to Piercy, the tax collector, and that he, on demand, has refused to pay over.

The defendant in his answer admits these allegations, but sets up as a counter-claim that he paid off and had receipts for an equal or greater amount of county debts, paid and taken up by him. Upon the trial below, the allegation of this counter-claim was stricken out of the answer as irrelevant, on the motion of the plaintiff. The defendant ad-
(182) mitted that he had no other defense, and judgment was thereupon rendered against him and his sureties on the bond for an amount which does not appear to be disputed, and the defendant appealed to this Court.

The only question submitted to this Court is whether the Court below had the power to strike out that part of the answer setting up the counter-claim, or whether the objection should not have been raised by a demurrer.

We think the Court had the power to strike out as "irrelevant" under either secs. 109 or 120, C. C. P., and that the power was properly exercised. This Court has held in *Huggins v. Harrison,* 61 N. C., 126, and in the recent case of *State v. Lutz,* 65 N. C., 503, that the tax list, when made out by the County Commissioners is a judgment, and when delivered to the tax collector it is an execution against the taxpayers. If an execution is delivered to the Sheriff he is

bound to obey the precept by collecting the money and paying it into the proper office.

Suppose a motion is made to amerce the Sheriff for a failure to execute and make due return of the execution: no one would for a moment claim that it would be any answer for him to set up that he was a creditor of the plaintiff in the execution, and retained the money as his own debt. He must collect the money and pay it into the office; when having complied with the exigency of the writ, he is placed at arm's length with his debtor, and may resort to the same remedies as other creditors. *Bryan v. Hubbs,* 69 N. C., 428. The Sheriff would have a most unjust advantage over all other creditors if he could thus appropriate to his debts, whether just or unjust, money which must necessarily go through his hands.

If the tax collector could thus retain the county fund, by virtue of claims against the county, picked up by him, whether just or unjust, the counties are at once placed at his mercy, and the wheels of county government arrested for one, two years, or indefinitely. And upon the same principle the Treasurer of the State could stop the ad- (183) ministration of the State government. Public policy and the very nature of the thing will give no countenance to such a defense.

It makes but little difference whether the point is made by demurrer—the more regular way—or by an order striking out that part of the answer, as was done here. Upon demurrer the plaintiff would be entitled to judgment, and by striking out that part of the answer they are still entitled to their judgment. No error.

PER CURIAM. Judgment affirmed.

Cited: Dail v. Harper, 83 N. C., 7; *Guilford v. Georgia,* 112 N. C., 36.

FLORENCE C. HARRIS v. DAVID A. JENKINS, Public Treasurer.

1. A *feme covert* cannot convey her property without the written assent of her husband.

2. Where a *feme covert* executed a bond without such assent, and judgment was obtained thereon, and her property levied on: *Held*, that the execution of an instrument by the husband for the purpose of postponing the sale of the property was not a ratification of the bond executed by the wife, and did not obviate the necessity of his written assent.

(*Frazer v. Brownlow*, 38 N. C., 237; *Harriss v. Harriss*, 42 N. C., 111; *Draper v. Jordan*, 58 N. C., 175; *Withers v. Sparrow*, 66 N. C., 538; *Kerns v. Peeler*, 49 N. C., 226; *Gray v. Matthis*, 52 N. C., 502, cited and approved).

MOTION to set aside a judgment, before *Henry, J.*, at Fall Term, 1874, of WAKE.

The material facts in the case are as follows: The plaintiff, Florence C. Harris, on 1 September, 1873, signed a bond, conditioned for the payment of $45,000, whereby she be-
(184) came a surety for the collection of taxes by one T. F. Lee, then Tax Collector of Wake County. At the time of signing said bond plaintiff was and still is a married woman. Plaintiff signed the bond without the written assent of her husband.

At January Term, 1874, of the Superior Court of Wake County, a judgment was rendered against the plaintiff and others who executed the bond.

Execution issued on said judgment on 18 May, 1874. On 29 September an affidavit and complaint were filed in the office of the Clerk of the Superior Court, praying a restraining order against the defendant and that the judgment might be annulled as to plaintiff.

The case was heard before *Henry, J.*, at chambers, on 29 September, 1874. The restraining order was granted, and the defendant ordered to appear at next term of Wake Superior Court and show cause why the motion of the plaintiff should not be allowed.

The motion was heard at Fall Term, 1874, upon affidavits, and the judgment annulled as to plaintiff. From this judgment the defendant appealed.

The grounds of appeal are sufficiently set forth in the opinion of the Court.

Attorney-General Hargrove and *Smith & Strong,* for the appellant.

E. G. Haywood and *Batchelor, contra.*

RODMAN, J. This is an action in which the plaintiff seeks to vacate and set aside an execution levied on her real estate, which issued upon a judgment obtained against her in the name of the State on the relation of the defendant as Public Treasurer. The judgment was obtained upon a bond made by one Lee as Sheriff for the collection, etc., of the public taxes, which she, and others also, executed as the sureties of said Lee, she having been at the execution of said bond, and still being, a married woman.

It is clear, of course, that at common law the bond of a married woman was absolutely void. If a mar- (185) ried woman owned separate property she was allowed in equity to contract and bind that property. The courts of different States differ somewhat in their view of her powers in such cases. In this State it has been held that she could make a valid contract, to bind her separate estate in law, only with consent of her trustees. *Frazer v. Brownlow,* 38 N. C., 237; *Harriss v. Harriss,* 42 N. C., 111; *Draper v. Jordan,* 58 N. C., 175; *Withers v. Sparrow,* 66 N. C., 538.

The Constitution of 1868, Art. X, sec. 6, gives to a married woman a sole and separate estate in all her property, real and personal, and it enacts that such property, *with the written consent of her husband,* may be conveyed by her as if she were unmarried. The Act of 1871-'72, ch. 193, sec. 17, enacts that no woman during her coverture shall be capable of making any contract to affect her real or personal estate (except in certain cases, of which this is not one) without the written consent of her husband, unless she be a free trader.

By the express language of this act the bond in question is void as to the plaintiff, and we think it would have been so without the act under the Constitution and the authorities above cited.

It is contended, however, that the original defect was subsequently cured, and that J. C. L. Harris, the husband of the plaintiff, ratified and thereby made valid the execution of the bond by her.

The facts bearing on that point are these: After judgment had been obtained on the bond, and after execution had been levied on the land of the plaintiff, all the defendants in the judgment (with the exception of the plaintiff), and also the said J. C. L. Harris, the husband of the plaintiff, who was not a party to the judgment, signed a writing to the effect that if the Sheriff would postpone the sale of the property then levied on, until the first Monday of the ensuing October, they would waive advertisement notice, homestead and personal property exemption, and if the judgment was not paid before
(186) the same day in October, the Sheriff might then sell the property. To this paper the name of the plaintiff was also signed by her said husband without her knowledge or consent.

1. The instrument does not purport to ratify on the part of the husband the previous execution of the bond by his wife. It was given merely with the intent to procure a postponement of the threatened sale.

2. The doctrine of ratification as between principal and agent does not apply in this case. Mrs. Harris did not profess, in executing the bond, to have acted as agent of the husband. She was acting in her own independent right, although she acted when she had no power to act.

3. It seems to be established that a conveyance by husband and wife of her lands must be *jointly* executed, or at least both must concur in it at the time of its delivery. *Kerns v. Peeler,* 49 N. C., 226; *Gray v. Matthis,* 52 N. C., 502. And the doctrine is equally applicable to the written assent, which the Act of 1870-'72 requires, to the contract of a married woman. The assent of the wife and that of the husband to her contract must at some moment *co-exist.*

For these reasons we think the instrument referred to did not validate the bond as to the plaintiff.

PER CURIAM. Judgment affirmed.

Cited: Gulley v. Macy, 81 N. C., 366; *Nicholson v. Cox,* 83 N. C., 54; *Scott v. Battle,* 85 N. C., 188; *Slocomb v. Ray,* 123 N. C., 574; *Ball v. Paquin,* 140 N. C., 89.

STATE v. FRANCIS THORP.

Upon a trial for murder it is error to call on a witness to give his "best impression" concerning transactions of which he has no personal knowledge.

INDICTMENT for murder, tried before *Henry, J.,* at Fall Term, 1874, of GRANVILLE.

The defendant Francis Thorp was charged with the murder of her child by throwing him into a river. On (187) the trial below, a witness on the part of the State swore that he saw the defendant and one Peter Goodwin going in the direction of the river about three-quarters of a mile from the ford where the child was found dead; that he knew the prisoner well; he also knew the deceased. That on the evening when he saw defendant going to the river she had a child in her arms; he was distant some one hundred yards, and was not sure that the child was the child of defendant.

The jury returned a verdict of guilty. Rule for new trial, etc. Rule discharged.

Defendant appealed. The grounds of appeal are fully stated in the opinion of the Court.

Attorney-General Hargrove, for the State.
T. B. Venable, for the prisoner.

READE, J. The prisoner was charged with drowning her child in a river. A witness saw her going towards the river with a child in her arms. The witness said he knew the prisoner and identified her; he knew the child also, but he was one hundred yards off and was not sure who the child in her arms was. He was then asked if he recognized the child as the deceased; which question was objected to by the prisoner and ruled out by the Court; for what reason we cannot conceive, as it was clearly competent. Possibly it was ruled out as being a leading question. The Solicitor then asked, "Is it your best impression that the child she had in her arms was her son Robert Thorp?" The witness said it was. This question was objected to, but was admitted. If the former question was leading, this was more so; but there is a more substantial objection to it.

It is true that in very many cases a witness may give "his impressions" or his "opinions" as to facts. Indeed, memory is so treacherous, knowledge so imperfect, and even the senses so deceptive, that we can seldom give to positive assertions any other interpretation than that they are the im-
(188) pressions or opinions of the witness. Do you know when a certain act was done? I do. When was it? I think it was in January. Where was it? It was in Raleigh. At what place in Raleigh? I think it was at the hotel; it may have been at the capitol. Who did it? Mr. A. Was it not Mr. B? It was one or the other, and my best impression ~~is~~ that it was Mr. A. All that would be proper, because the witness is speaking of facts within his knowledge and as he understands them. So if in this case the witness had been asked, Did you know the deceased child? Yes. Did you see it in the person's arms? Yes. Did you recognize it as the deceased? Yes, I think it was; that is my best impression. All that would have been proper. But we think the case presented to us will bear the interpretation that the witness said: "I saw the prisoner have a child in her arms. I was so far off that I could not tell what child it was, but I knew that she had a child of her own, and I suppose she would not have been carrying any other child than her own; therefore I think it was her own child. That is my best impression." And this was clearly improper. This was but his *inference* from what he saw and knew. And we suppose that any bystander in the Court who heard the trial might have been called up and he would have testified that his "best impression" was that it was her child, from the evidence. A witness must speak of facts within his knowledge. He knew that the prisoner had a child of her own, and he knew that she had a child in her arms, and these facts it was proper for him to state; but he could not go further and say: "From these facts which I know I infer that the child was her own; I am not sure, but that is my best impression." This may not have been the sense in which he intended to be understood, but we think it will bear that construction. And in favor of life we so construe it. He certainly did not mean to say that he recognized the child as the child of the prisoner, and yet he knew her child very well. Why did he not recognize the child as he did the prisoner?

Evidently because at that distance he could not recognize one child from another in the arms of the pris- (189) oner. It was probably but little more distinct than a bundle, and he just took it to be her child because she had it in her arms. Probably this was all he meant by his "best impression." And it was error to allow it.

Undoubtedly counsel has the right to argue both the facts and the law to the jury in a criminal case, and to read authorities. And after he has done so, the prisoner has the further right to have his Honor instruct the jury upon any disputed point. And we doubt whether it is sufficient for his Honor to have a book or a decided case read to the jury, and leave them to draw their own conclusions. The practice is new and not to be commended, but we need not decide it, and there is error upon the other point. There is error.

PER CURIAM. *Venire de novo.*

Cited: S. v. Lytle, 117 N. C., 803.

HUGH GWYN, exr., etc., v. JOHN R. PATTERSON.

One who signs a covenant as surety upon the condition and agreement between him and his principal that it is not to be binding upon him, or delivered to the covenantee, unless another person should also sign it as surety, is bound thereby, although the principal to whom he intrusted it deliver it to the covenantee without a compliance with such condition, of which and its breach the latter has had no notice.

(*Townsend v. Moss,* 58 N. C., 145, cited and approved).

ACTION to recover money due on a bond, tried at Spring Term, 1873, of SURRY, before *Cloud, J.,* and a jury.

Plaintiff declared on a bond, of the tenor following:

$250.00. One day after date, we promise and oblige ourselves, our heirs, etc., to pay to Phillip Johnson the just and full sum of two hundred and fifty dollars, (190) borrowed money; value received. As witness our hands and seals, this 22 April, 185—.

W. L. MINTER, [SEAL.]
J. R. PATTERSON, [SEAL.]
[SEAL.]

Johnson, the obligee in the bond, is dead, leaving a will, of which the plaintiff is executor.

It was admitted on the trial that the defendant Patterson signed and sealed the bond declared on, but he denied that the same was ever by him delivered. He, the defendant, then offered to prove by Minter, the other obligor in the bond, that he had signed and sealed the same as an escrow only. To this the plaintiff objected, on the ground that Minter was incompetent to testify concerning this matter because it was a transaction between him and the plaintiff's testator, now dead. The Court overruled the objection, and Minter testified that he, desiring to borrow some money, applied to the defendant to become his surety. This the defendant refused to do unless one A. J. Satterfield, or one Merlin Sparger, would become his co-surety. The witness, Minter, told the defendant that he would get Satterfield to sign the bond with him.

The defendant then offered himself as a witness to prove the circumstances under which he signed and sealed the bond, but not for the purpose of testifying as to any transaction between himself and the plaintiff's testator. The evidence was objected to by the plaintiff, who insisted that every act in executing the alleged bond was a transaction between the defendant and his testator, although not done in the immediate presence of the latter. His Honor again overruled the plaintiff's objection, and the defendant stated that the said Minter applied to him to become his surety on a bond for borrowed money from the said Johnson, the plaintiff's testator;
(191) that he refused to do so unless either one or the other of the persons named in the evidence of Minter would become co-surety with him. That Minter informed him that Satterfield would stand with him, and with the understanding that Satterfield would sign the bond it was prepared by Minter, who signed it and arranged the seals for two other signatures besides his own; that he, Minter, did not bring the paper himself to him, the defendant, to sign, but sent it to him by his son; that he signed it, and handed it back to the son, saying to him at the time, "Go now and tell your father he must get A. J. Satterfield to sign it."

The defendant further testified that about a year after its execution he heard that the paper was in Johnson's hands, to whom he at once sent word to make his money out of Minter,

who was then good; for that he, the defendant, was not and would not be responsible for the same. On his cross-examination the defendant stated that after signing the alleged bond he did not expect to see it again, and that he did expect Satterfield to sign it.

There was no evidence that Johnson, the said testator, knew anything whatever of the conversation between Minter and the defendant.

The Court instructed the jury that to constitute the execution of a deed, signing and sealing and delivery was necessary; that the delivery by the defendant to the principal obligor, Minter, was, in law, a delivery to Johnson, the plaintiff's testator. That the jury must be satisfied of the execution of the deed by the defendant before the plaintiff would be entitled to recover; but that if they believed the evidence, the plaintiff was entitled to recover.

The defendant asked his Honor to give the following instructions to the jury:

That if the testimony of the defendant Patterson is believed, there was no delivery from him to the plaintiff's testator.

That an agent to execute a bond or deed must have authority under seal, and that delivery, being a part of the execution, an agent must have authority under (192) seal.

That if the jury believe Minter or Patterson, they have evidence that the paper relied on as a bond was simply an escrow.

The Court refused to give such instructions, and further informed the jury that Minter might be the agent of the defendant to deliver the bond for him, and if the jury believed that Minter delivered this bond to the plaintiff's testator and procured from him his money, the plaintiff would be entitled to recover; but they must be satisfied that the bond was delivered to the said testator.

The jury returned a verdict for the plaintiff. Motion for a new trial on the ground of errors in the charge of the Court, and of his Honor's refusal to instruct the jury as prayed by defendant. Motion refused. Judgment in accordance with the verdict; from which judgment the defendant appealed.

Graves, for appellant.
Dillard & Gilmer and *Shipp & Bailey, contra.*

SETTLE, J. The bond which is the subject of this action came to the hands of the plaintiff's testator, perfect in form, with nothing about it to excite inquiry and put the obligee on guard. He received it and advanced his money thereon, and it is only when suit is brought for the collection thereof several years thereafter that we hear anything of a private understanding between Minter, the principal obligor, and Patterson, his surety, the present defendant, that another surety should also sign the bond before delivery. Concede that such was the understanding between Minter and Patterson, what is it worth when we consider the fact that Johnson, the plaintiff's testator, when he parted with his money knew nothing about the conversation and understanding between Minter and Patterson?

Conditions imposed by a party to a contract, to be effectual against the other party, who has been induced by the
(193) contract to alter his condition, to his prejudice, must have been in some way brought to his notice. In *Townsend v. Moss,* 58 N. C., 145, with a similar state of facts to the case at bar, it was said by the Chief Justice, *arguendo,* "If loss follows from this breach of confidence it should fall on the party who reposed the confidence, rather than on an innocent third person." Or, in other words, where one of two innocent persons must suffer by the acts of a third, he who had enabled such third person to occasion the loss must sustain it. In *State v. Peck,* 53 Maine, 284, *Burrows, J.,* has collected and distinguished the cases on this subject in so satisfactory a manner as to render a further discussion of it unnecessary. We will only quote the syllabus in *Millett v. Parker,* 2 Metcalf, 608, which is directly in point: "One who signs a covenant as surety upon the condition and agreement between him and his principal that it is not to be binding upon him or delivered to the covenanter unless another person should also sign it as surety, is bound thereby, although the principal to whom he intrusted it delivered it to the covenanter without a compliance with such condition, of which and its breach the latter has had no notice."

PER CURIAM. Judgment below affirmed.

Cited: Vass v. Riddick, 89 N. C., 8; *R. R. v. Kitchin,* 91 N. C., 44; *Bank v. Hunt,* 124 N. C., 175; *Rollins v. Ebbs,* 138 N. C., 145.

STATE v. WILLIAM B. ARMSTRONG.

From a general verdict of "not guilty" in the Court below, no appeal lies to this Court.

(*State v. Phillips,* 66 N. C., 646; *State v. Freeman, Ibid.,* 647, cited and approved).

CRIMINAL ACTION for refusing to work on a road, tried at the Fall Term, 1874, of TYRRELL, before *Eure, J.*

The action originally commencing in a justice's (194) court (Bat. Rev., ch. 104, sec. 10), was carried by appeal on the part of the State to the Superior Court. On the trial in that Court the Solicitor for the State offered to prove *by parol* that the defendant was liable to work the road upon which he had been notified to work by the overseer. His Honor rejected the evidence. The Solicitor then asked his Honor to charge the jury, "that the State having proved that the defendant lived on said road, he was presumed to be a hand thereon, and liable to work the same." This instruction his Honor declined to give, and charged the jury that the State having failed to prove that the defendant had been assigned as a hand to work said road, or that he lived in a road district in which the hands had been assigned to work said road, no case was made against the defendant, and he was entitled to an acquittal. To this charge the Solicitor excepted for error in law.

The jury returned a verdict of "Not guilty," whereupon the State appealed.

Attorney-General Hargrove, for the State.
No counsel for defendant.

SETTLE, J. After the numerous decisions of this Court holding that no appeal is allowed to the State after a general verdict of "Not guilty" has been recorded in favor of the de-

fendant, we are unable to account for this appeal upon any other supposition than that the record does not develop the case intended to be presented. It may have been that there was a special verdict, but such does not appear, and we are bound by the record, which simply shows an appeal by the State, after a general verdict of "Not guilty."

In addition to the authorities cited in *State v. Phillips,* 66 N. C., 646, to show that no appeal lies in such cases, we cite *State v. Freeman, Ibid.,* 647.

This disposes of the appeal and renders it unnecessary to notice the questions presented by the record.

(195) Let this be certified to the Court, that the defendant may be discharged.

PER CURIAM. Appeal dismissed.

Cited: S. v. Powell, 86 N. C., 643; *S. v. Ostwalt,* 118 N. C., 1214; *S. v. Savery,* 126 N. C., 1088.

ELI T. REGAN v. J. S. J. REGAN.

The best evidence of a discharge in bankruptcy is the certificate of such discharge; and this the party pleading the bankruptcy must produce or account for its non-production, before parol evidence of the discharge can be admitted.

ACTION to recover the rent of certain turpentine boxes, commenced before a justice of the peace and carried by the appeal of the plaintiff to the Superior Court of ROBESON, and there tried before *Clarke, J.,* at the January (Special) Term, 1874.

On the trial below his Honor allowed the plaintiff to prove his discharge in bankruptcy, by his own parol testimony. To this defendant excepted, and for other errors, not considered in this Court, appealed.

W. F. French and *Jones & Jones,* for appellant.
N. A. McLean and *W. McL. McKay, contra.*

BYNUM, J. The plaintiff declared for the use and occupation of 6,866 turpentine boxes, which he owned and which

were worked by the defendant for the year 1872. The defendant, among other defenses, set up as a counter-claim a note for $400, due to him from the plaintiff. The plaintiff replied a discharge in bankruptcy.

On the trial the plaintiff was introduced as a witness in his own behalf, and, under objection by the defendant, was allowed by the Court to testify that he was discharged in bankruptcy.

The best evidence of the discharge was the certifi- (196) cate of discharge, and that the plaintiff was bound to produce in evidence, or show sufficient excuse for its non-production, before the parol or inferior evidence could be admitted. This principle of evidence is too plain to require the citation of authority to support it.

It is unnecessary to notice the other exceptions assigned as errors.

PER CURIAM. *Venire de novo.*

ELI T. REGAN v. JOSEPH S. J. REGAN & SON.

Where the plaintiff and defendant swear to a contradictory state of facts, and the jury find the issues in favor of the plaintiff, the questions of law arising from the statement of the defendant will not be considered upon an appeal to this Court.

ACTION to recover the rent of certain turpentine boxes, commenced before a justice of the peace, and carried by the appeal of the defendants to the Superior Court of ROBESON, where it was tried by *Clarke, J.*, at January (Special) Term, 1874.

In his complaint the plaintiff alleged that in the year 1871 he rented to the defendants 6,866 turpentine boxes at $15 per thousand, amounting to $102.99, which has not been paid.

This allegation the defendants deny, charging that they rented from the plaintiff *his interest* in 6,866 turpentine boxes during the said year, in consideration of the defendant Joseph having paid certain taxes on the land for twenty years.

The defendants further insisted that the land upon which the boxes were belonged to the plaintiff and nine others, and that therefore the plaintiff was only entitled to his particular share, to-wit, one-tenth of said rent.

(197) The plaintiff denied that the consideration of the renting was the payment of the taxes claimed by the defendants; and also insisted that the land had been divided and the several portions allotted to the respective owners before the renting took place.

The plaintiff and the defendant were examined as witnesses and testified adversely to each other. The jury found a verdict for the plaintiff. Judgment, and appeal by defendants.

W. F. French and *Jones & Jones,* for appellant.
N. A. McLean and *W. McL. McKay, contra.*

BYNUM, J. The plaintiff alleged that he rented to the defendants 6,866 turpentine trees for the year 1871 at $15 per thousand. That this was done after the partition of the lands between the tenants in common, and each one had entered upon his part. These facts were testified to on the trial by the plaintiff, who was examined in his own behalf. The defendants allege that the renting took place before the partition and that they were liable only for their ratable part of the rent, and the defendant J. S. J. Regan so testified, being examined in his own behalf. The question of law as to the apportionment of the rent does not arise, because the jury found the issues in favor of the plaintiff; that is, that he rented his own share to the defendants after the partition. There is no error.

PER CURIAM. Judgment affirmed.

(198)

JAMES C. STAFFORD, admr., etc., v. EPHRAIM HARRIS, guardian, etc.

1. The cases required by sec. 420 of the C. C. P. to be submitted by the Judge of Probate to the Judge of the Court in or out of term, are those only where the petitioners are infants and the proceedings are *ex-parte*.

2. Where an administrator petitions to sell a certain tract of land for the payment of debts, which land is particularly identified and described by metes and bounds in the petition and the order of sale, the order confirming the sale and the order to make title; and before the title is made to the purchaser of the land, the administrator dies: *Held*, that the Probate Court had no authority, after such order and confirmation of sale and order to make title, to entertain a motion in the cause on the part of the purchaser to so amend the pleadings as to include another tract of land not therein mentioned:

3. *Held further*, that under the circumstances, even if the case was properly before the Court, his Honor would have no power to amend the petition upon parol evidence that a tract of land had been omitted therefrom through mistake.

MOTION in the cause, to amend the original petition, heard before *Albertson, J.*, at chambers, in PASQUOTANK.

The petition was originally filed before the Judge of Probate, and the amendment allowed by him. The petition involving the interests of infants, the Judge of Probate transmitted the papers to the Judge of the Court, who confirmed the order made in the Probate Court, from which judgment the defendants in the original petition appealed.

All the material facts, pertinent to the points decided, are fully stated in the opinion of the Court.

Smith & Strong, for appellants.

No counsel *contra*.

BYNUM, J. The plaintiff, as administrator, instituted special proceedings in the Probate Court against the defendants, who are the infant heirs of the intestate, (199) for the sale of a tract of land to make assets for the payment of debts. The petition for that purpose contained the following description of the land: "One tract of land in Pasquotank County containing 90 or 100 acres, more or less, adjoining the lands of Frank Jennings, Lowry Davis, Samuel

Rhodes and C. L. Whitehurst." The defendant answered, admitting the necessity of the sale, and an order of sale was made as prayed for. The administrator in advertising the sale described the land as one tract as set forth in the petition and order of sale, and the land was sold by the same description, the sale confirmed by the Court, and the title was ordered to be made on the payment of the purchase money.

The money has been paid, but the administrator died before the title could be made. The purchaser, one Hinton, now files his petition in the Probate Court, as a foundation for a motion in the cause, alleging that the intestate owned another small tract of ten acres near this larger one, but separated therefrom by an intervening strip of land about 200 yards wide belonging to a third person. He alleges that it was intended by the administrator to sell all the land of the intestate, which consisted of these two tracts only, and that both he and others who bid so understood it. The motion is, to be allowed to amend the petition so as to set forth by apt words of description the small tract of land, and that the subsequent pleadings and decree of sale be made conformable thereto, and that under his said purchase the title be made to him for both tracts of land. The Court of Probate, after hearing much evidence, which was objected to by the defendants, allowed the motion, but the rights of infants being involved, the Court certified the case and his judgment thereon to the Judge of the District, who upon hearing the same affirmed the judgment of the Probate Court and ordered the Clerk to make title to both tracts of land to Hinton, the purchaser, and the defendants appealed to this Court. There is error.

(200) 1. The Judge of the district had no jurisdiction in the case as constituted. It is a mistake to suppose that in all special proceedings before the Clerk, where the interests of infants are involved, these proceedings must be submitted to and approved by the Judge of the district. The rule applies only in those cases where the petitioners are infants and the proceedings are *ex-parte*. C. C. P., secs. 418-19-20. Our case is not *ex-parte,* but is an adversary action wherein the Clerk has exclusive original jurisdiction,

and where his judgments are final, subject only to the right of appeal. Bat. Rev., ch. 45, sec. 61, *et seq.*

2. The Court of Probate here had no jurisdiction to make any order in the cause as it then stood, for the pleadings show that at the time Hinton, the purchaser, made his motion, and the Court allowed it, the plaintiff in the action was dead, and the action in fact was abated. There being then no case regularly constituted in Court, the motion and order in the cause were irregular and void.

3. But the question intended to be made and submitted to this Court is, assuming the case to be properly here, had the Court of Probate the power to make the amendment prayed for and allowed? While the power of amendments is liberally vested in the several courts, both by the section relied on, C. C. P., sec. 132, and other sections of The Code, and while we lay down no unvarying rule which is to govern amendments in all cases, it is safe to say that the law confers upon the Clerk the power to make no such amendment as this. The petition, order of sale, confirmation of sale and order to make title was for a single tract of land, identified and made certain by boundaries and description. It is now proposed to show by parol evidence that the purchaser bought, not only this tract, which was described in the pleadings, but that in fact he also bought another and distinct tract of land, neither named nor described in the petition or decree of sale. If the title to land could be passed in this way a wide door would be opened for fraud and perjury, which it is the purpose of the statute to prevent. (201)

PER CURIAM. Judgment reversed and petition dismissed.

Cited: Mauney v. Pemberton, 75 N. C., 221; *Spencer v. Credle,* 102 N. C., 76.

STATE v. SHADRACH MANUEL.

Wounding of cattle maliciously is not an indictable offense at common law.

INDICTMENT for malicious mischief, tried before *Buxton, J.*, at Spring Term, 1874, of CUMBERLAND.

On the trial below, the State introduced evidence tending to show a condition of ill-feeling between the defendant and the prosecutrix, Sylvia Jenkins; that he had made threats of injury to her person and property; that in August, 1873, he had killed a couple of her hogs and had chopped her ox on the hip with an axe, giving the animal a serious wound, which had to be sewed up, and which disabled the ox from work until it recovered, which it eventually did.

There was also evidence tending to show that the prosecutrix's stock (hogs and ox) were in the habit of breaking into the field of the defendant and injuring his crop, and that he had complained to her about it, threatening to kill them if they did not quit it.

The defendant attacked the credibility of the State's witnesses; and denied that he did the acts for which he was indicted; and insisted that the motive attributed to him was not established by the proof, viz., malice towards the owner. So far as the ox was concerned, defendant insisted and asked his Honor so to charge that the offense known as "malicious mischief" had not been committed, under any aspect of the case, inasmuch as the ox was not *killed*, but was *wounded*, and had recovered from its injuries, and so was not *destroyed*.

His Honor charged that the State must prove that
(202) the defendant did the acts with the motive charged.

If they were satisfied that the defendant did the acts, not through malice to the owner, but in a moment of passion, provoked by the stock breaking into his crop, he could not be convicted under this indictment. But if they were satisfied that the defendant killed the hogs of the prosecutrix, or seriously injured her ox by wantonly chopping it with an axe, through ill-will and malice to the owner, they should find him guilty. To this charge the defendant excepted.

There was a verdict of "Guilty." Defendant moved for a new trial, on the ground of misdirection of the jury. Motion overruled. Judgment, and appeal by the defendant.

J. W. Hinsdale, for defendant.
Attorney-General Hargrove, for the State.

BYNUM, J. This indictment is not founded on the statute, Bat. Rev., ch. 32, secs. 94, 95, but is at common law; and the question is, Is it an indictable offense at common law to wound cattle maliciously?

It has been held in this State indictable to set fire to and burn tar in barrels, to kill a steer, and to kill a dog with malice towards the owner: *State v. Simpson,* 9 N. C., 460; *State v. Scott,* 19 N. C., 35; *State v. Latham,* 35 N. C., 33; and to burn plows and harness: *State v. Jackson,* 34 N. C., 329. But in all these cases the property was killed or destroyed; and no case is to be found in our reports of an indictment at common law, when the offense was the wounding of cattle, or the mere injury to the property short of its destruction.

If we look to England, the source of the common law, we are unable to find a case where, independent of statute, it has been held to be a public offense to maim cattle, whether with or without malice towards the owner. Both the elementary writers and the decisions hold that such offense is not indictable, but is a civil trespass only. 4 Bl. Com., 244; 2 East Pl. Cr., ch. 21, sec. 16; 2 Russ. on Cr., 497; *Regina v. Wallace,* Cr. and D. Cr. Cases, 403; and no prece- (203) dent of such a form of indictment, at common law, or independent of statute, is to be found. Arch. Cr. Pl., 182; 3 Chit. Cr. L., 1087.

In the American courts the decisions upon this subject have not been uniform; and in several of the States malicious mischief, as a common-law offense, has received a much more extended interpretation than has been attached to it in England. *People v. Smith,* Cowen, 258; *State v. Teischer,* 1 Dalb., 335; 19 Wend., 419. But even in these cases the *corpus* of the property was destroyed; and it will be difficult to find a case where injuries short of destruction have been held to be indictable at common law, and certainly the

weight of authority in both countries is decidedly the other way. *State v. Bukman,* 3 Dutcher, 124, and authorities therein cited.

This Court will not be warranted in expounding the common law so as to make offenses indictable which were not clearly indictable before. That is a matter for the consideration of another department of the government. We have, by statute, made it an indictable offense unlawfully and on purpose to kill or maim live-stock, under the circumstances described in the statute before cited, but not under all circumstances. Whether the interests of justice and sound morality do not require the punishment, as a public offense, of all wanton cruelty to live-stock is a question which is attracting much public attention and discussion both at home and abroad, and deservedly so. The remedy for the evil is with the Legislature. It is our province to declare the law to be that this indictment will not lie at common law, and that therefore judgment must be arrested. There is error.

PER CURIAM. Judgment reversed.

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(204)

STATE v. PETER PRESLY.

The Superior Courts have concurrent jurisdiction with justices of the peace of the offense of entering on land after being forbidden so to enter. If complaint is not made by some person within six months from the commission of the offense a justice has no jurisdiction, and its cognizance is left to the Superior Court.

(*State v. Perry,* 71 N. C., 522, cited and approved).

INDICTMENT for criminal trespass on the land of the prosecutor, and cutting trees thereon, tried at the Fall Term, 1874, of UNION, before *Buxton, J.*

The grand jury found a true bill against the defendant at Fall Term, 1873. On the trial, Fall Term, 1871, the defendant moved to dismiss the indictment for want of jurisdiction in the Superior Court to try the same, contending that the jurisdiction was taken from the Court by the Act of 1873-'74, ch. 176, and that the offense was now only cognizable in a justice's court.

The Solicitor resisted the motion, and insisted that the Superior Courts had concurrent jurisdiction; that the Act of 1873-'74, by not repealing the whole of sec. 116, ch. 33 of Battle's Revisal, but only subdiv. 1 of that section, leaving subdivs. 2 and 3 undisturbed, made it necessary still, in order to give justices of the peace final jurisdiction, that the requisites contained in subdivs. 2 and 3 should be complied with. It was further insisted on the part of the State that more than *six* months having elapsed since the commission of the offense, if the case was dismissed, no Justice could now assume jurisdiction.

The motion to dismiss was overruled, and the defendant excepted.

On the trial the jury returned a verdict of "Guilty." Judgment, and appeal by defendant.

No counsel for defendant.

Attorney-General Hargrove and *Josiah Collins,* for the State.

RODMAN, J. The defendants were indicted at Fall Term, 1873, of the Superior Court of Union County, (205) for entering on the lands of the prosecutor after having been forbidden to do so, and carrying away certain timber found thereon. The offense is charged to have been committed on 1 January, 1873. The trial took place at Fall Term, 1874, which began on 5 October. The defendant moved to dismiss the bill for want of jurisdiction in the Court, contending that exclusive jurisdiction of the offense had been given to a justice of the peace. The Court refused the motion, and the defendant Presly was convicted and fined, and he appealed. The provision of Art. IV of the Constitution, concerning the jurisdiction of the Superior Court and justices of the peace, is too familiar to require more than this general reference.

The Act of 1866, ch. 61 (Bat. Rev., ch. 32, sec. 116), created the offense in question, and declared that it should be a misdemeanor; and further declared that if any one not being the owner or *bona fide* claimant of lands, should unlawfully enter thereon and carry off wood, etc., he should be deemed guilty of larceny. This act left the punishment dis-

cretionary with the Court, and consequently the Superior Court alone had jurisdiction to try the offense. By the Act of 1868-'69, ch. 178 (Bat. Rev., ch. 33, sec. 114, etc.), it was enacted that justices of the peace should have jurisdiction to hear, try and determine, in the manner prescribed in that chapter, criminal actions for several described offenses, among which, in sec. 116, are "indictable trespasses on real or personal property, when the punishment imposed by law does not exceed fifty dollars fine or one month's imprisonment." As this act does not alter the punishment of the offense in question, but left it still discretionary, it gave no final jurisdiction. The Act of 1873-'74, ch. 176, sec. 8, ratified 10 February, 1874, amends ch. 61 of the Act of 1868 (Bat. Rev., ch. 32, sec. 116) by adding thereto, "the punishment of this offense shall not exceed a fine of fifty dollars, or imprisonment for one month." Under this act and the clause in the Con-
(206) stitution above referred to, it seems clear that a justice must have exclusive jurisdiction unless the grant of it be qualified and limited by the provisions of the Act of 1868-'69, ch. 178, by which the jurisdiction of a justice is made contingent upon several conditions, two of which are that the complaint shall be made by the party injured and within six months after the commission of the offense. This condition is expressly retained by sec. 13 of the Act of 1873-'74, ch. 176.

In the case of *State v. Perry,* 71 N. C., 522, the Court held that where the maximum punishment of an offense was reduced within the limits of a justice's jurisdiction, if the offense was one by which from its nature no person was particularly injured (as in that case the offense of fornication and adultery), inasmuch as the act positively and expressly gave a justice jurisdiction, the requirement that the party injured must complain, was impossible, and did not apply. The general intent expressly declared to give a justice jurisdiction was held to override the subordinate provisions as to the complainant, which could not be enforced without making the act nugatory. But it is not then said that if complaint before a justice be not made by some person within six months, the Superior Court is excluded of its jurisdiction. In cases of the nature of the present there is a person particularly in-

jured, and if that person omits to complain to a justice within six months, the Justice can have no jurisdiction, for the condition precedent to it has not occurred. It differs in that respect substantially from *State v. Perry, supra.*

It is not our duty in any case to indicate or even inquire into the policy of an act of the Legislature, except so far as a consideration of its policy will aid us in ascertaining the legislative intent.

With this view, we have heretofore stated what in our opinion probably were the reasons which influenced the Legislature in passing the act under consideration. To take assaults and trespasses on land as examples for illustration: If universal jurisdiction of these offenses were given (207) to justices, many outrageous cases would necessarily escape with a nominal and inadequate punishment. If, on the other hand, jurisdiction of all such offenses was confined exclusively to the Superior Court, the evils which are recited in the preamble of the Act of 1873-'74, as the inducement to its enactment, would follow. It seems impossible in the nature of things to draw any line which, without a reference to the particular circumstances of each case, will certainly distinguish the light from the grave, in offenses to the person or property. And a discretion to draw such line in such case could not be safely left to the Justice, and much less to the offender. To obviate both these evils it seemed to the Legislature expedient to leave the election of a tribunal to the party injured in all cases where the injury partook of a private as well as of a public character, and where some person was especially injured. If such person thought the injury trifling, he was allowed to vindicate the public peace and his own wrongs in a summary way by proceedings before a justice. If, however, he thought that a punishment adequate to the purposes of justice was not within the power of a justice, he was permitted to omit any complaint before a justice and to prosecute in the Superior Court, where the punishment would be such as in the opinion of the Judge was adequate to the offense. The policy seems to have been: for trifling offenses a cheap and summary process, with a moderate punishment; and for grave offenses, a more deliberate and expensive process, and, if required, a graver punishment. The Constitution gave jurisdiction to

justices under such rules and regulations as the Legislature should prescribe. The Act of 1868-'69 was a contemporaneous exposition of the meaning of the clause. The Assembly considered that this power to make rules and regulations was not confined to prescribing forms of process and procedure, but enabled it to make the jurisdiction of justices conditional on the action of the injured party within a certain (208) time. This Court has in several cases concurred in this opinion, and it is too late now to question it. There is no error.

PER CURIAM. Judgment affirmed.

PETER A. WILSON v. JOSEPH SPARKS.

1. The Homestead Act does not impair the obligation of contracts, and is therefore not unconstitutional.

2. The homestead is not subject to execution for the payment of debts contracted before the adoption of the Homestead Act.

(*Hill v. Kessler*, 63 N. C., 437; *Garrett v. Cheshire*, 69 N. C., 396; *McKeithan v. Terry*, 64 N. C., 25, cited and approved).

ACTION for the recovery of land, tried before *Cloud, J.*, at Spring Term, 1874, YADKIN.

The complaint alleges that plaintiff and others obtained a judgment against the defendant upon a note executed in 1866. That the judgment was duly docketed in the Superior Court of Forsyth County on 13 January, 1869, and that it was afterwards, on 13 March, 1869, regularly docketed in the Superior Court of Yadkin County. A *fi. fa.* was issued upon said judgment, and the land sold by the Sheriff of Yadkin County. The plaintiff became the purchaser at the price of $130. The Sheriff of said county executed a deed conveying said land to plaintiff. After the judgment was rendered the defendant had all of said land laid off as a homestead.

The plaintiff further insisted that defendant is not entitled to said land as a homestead, because the debt upon which said judgment was rendered was contracted before the passage of the Homestead Act.

The defendant demurred to the complaint, and al- (209) leged that the said homestead was legal, and the sale thereof was void. That the plaintiff had not stated facts sufficient to constitute a cause of action.

The Court below sustained the demurrer, and thereupon the plaintiff appealed.

McCorkle & Bailey and *Josiah Collins,* for the appellant.
No counsel *contra.*

READE, J. I. Our statute provides that "no conveyance of land shall be good and available in law unless the same shall be proved and registered, and all deeds so executed and registered shall be valid and pass estates in land without *livery of seizin,* attornment or other ceremony whatever." Bat. Rev., ch. 35, sec. 1.

From this it will be seen that a deed cannot be used to support a title until "proved" and "registered." It is true that when registered it relates back and "passes the estate" as of the time of its execution, just as letters of administration relate back to the death of the intestate, but in neither case does the estate pass until the deed is registered or the letters are issued.

And so in setting out title by deed of bargain and sale enrolled, Chitty has this form: "And the said E F being so seized afterward, to-wit, etc., by a certain indenture of bargain and sale, then and there made between the said E F of the one part, and one G H of the other part, which said indenture sealed with the seal of the said E F, the said G H now brings here into Court, the date whereof is the date and year aforesaid, and which said indenture of bargain and sale was afterwards, etc., in due manner enrolled, etc., according to the form of the statute in such cases made," etc.

This form is under Statute 27 Hen. VIII., ch. 16: "Bargains and sales shall not enure to pass a freehold unless the same be made by indenture sealed and enrolled within six months," etc.

In our case there is no profert or exhibit of any (210) deed, or reference to, or offer to produce one, and no allegation that it has been registered. The only pretense of title is the declaration that he has a deed. The attention of the

plaintiff's counsel has been called to this defect, and time has been allowed to amend, but no amendment has been made, and therefore we presume that the fact is as it appears to be, that the plaintiff has no registered deed, and therefore no estate in the premises upon which he can recover.

II. Another objection to the plaintiff's recovery is that the premises in dispute have been allotted to the defendant as his homestead, and therefore were not subject to sale under execution for debt. To this the plaintiff replies that the debt was contracted prior to the law allowing a homestead, and therefore the homestead law did not apply. This question has been so often decided by this Court within the last five years that no elaborate treatment of it can be necessary in this case. *Hill v. Kessler,* 63 N. C., 437, is the leading case, and *Garrett v. Cheshire,* 69 N. C., 396, is the last case, in both of which the question is fully considered, and the last case in view of *Gunn v. Barry,* from Georgia, 82 U. S., 610. We have uniformly admitted that the State had no power to pass a law, either by statute or constitutional provision, impairing the obligation of a contract, but we have held that our exemption laws had no such intention and no such effect. We have had exemption laws for a long time, varying with the times, declaring upon their face the purpose to secure "necessaries and comforts" for families, until they have become a part of the polity of the State. With us it has been no rash experiment, nor spasm of prejudice of the debtor against the creditor class, but it has had a regular growth of half a century, increasing from time to time as necessity required and as their good effects were apparent. As embodied in our Revised Code of 1854, the exemptions of personal property are by articles named; and in many cases, according to the size and circumstances of families, they might at least equal the
(211) present exemptions. Up to 1866-'67, when we had another statute, they were increased until in many instances they might have doubled the present exemptions. And in 1868, when our present Constitution was adopted, it was provided in the Constitution that the personal property exemption should be five hundred dollars, without specifying the articles, so that it is clear that there was no purpose to defeat debts or to impair contracts so far as personal property exemptions are concerned.

Up to 1848 we had no real estate exemptions, and even a husband's interest in his wife's estate, which was for his life or for hers, as the case might be, was subject to execution sale for his debts. In 1848 that interest was exempted. In 1858 we had a statute which made a further exemption of fifty acres, or a town lot of two acres, not exceeding five hundred dollars in value. In 1866-'67 that was changed to an exemption of one hundred acres, without limit as to value. And in 1868, in our present Constitution, the real estate exemption is limited to one thousand dollars in value, for life, and in case of death with minor children surviving, until the youngest child arrives at age. So that our present exemptions are limited to $1,000 in value of land and $500 of personal property. Which in many instances, where families were large, is less than the exemptions have been for twenty years; and is probably not greater, where families have been of the average size, as to personal property exemptions for that period.

Take the case before us: the debt was contracted in 1866. At that time the defendant was entitled under the Act of 1858 to a homestead exemption of five hundred dollars value, if he had claimed under that act, and if fifty acres of his land had been worth that sum, which would unquestionably have been exempt from this debt. But our present homestead law repeals all other and prior exemptions, so that the defendant must take under the present law, or else have no exemption at all. It is true that the exemption law of 1858, while it allowed a homestead of $500, confined it to fifty acres; and here there are four hundred and thirty-two acres, so that under that law the whole tract could not have (212) been allotted to the defendant, although it may be worth only one hundred and thirty dollars, which is the sum at which the plaintiff bought it at the Sheriff's sale; but surely it cannot be that in establishing a polity for the general good the Legislature can be restrained by the minor consideration of whether exemptions shall be regulated by the number of acres or by the value. The exemption must be left to the discretion of the Legislature, with the single restriction that the act shall not have the intent and the effect to impair the obligation of contracts. Our exemption law had no such intent, and in legal contemplation it has no such effect.

And in the case under consideration it does not appear that the plaintiff's debt has been affected at all by the exemption, if we suppose that the Legislature had the power so to amend the homestead law of 1858 as to strike out the limit of number of acres, and let the limit of value stand as it was at $500. The exemption would then have stood "land not exceeding $500 in value." That would have covered the whole tract so far as appears before us. The whole tract sold at the sale for one hundred and thirty dollars, and while that might not have been its full value, on account of the dispute about the title, yet there is not only no evidence that it was worth more, but it is not even alleged in the complaint. And we know that in the mountains large bodies of land are worth very little. If this land is worth much the plaintiff ought, in fairness, to have bid its value, because his debt is bated nothing, and if he gets the land clear of the homestead it ought to be at its value. But so it is, that if his bid is less than the value, and he gets the land clear of the homestead, he has his debt less the amount bid, and the land also.

At the time of the adoption of our present homestead law it was only by a *levy* of execution that any lien was created or right vested which could affect the question. *McKeithan v. Terry,* 64 N. C., 25. There is no error.

PER CURIAM. Judgment affirmed.

Cited: Edwards v. Kearsey, 74 N. C., 243; *Triplett v. Witherspoon, Id.,* 476; *McMillan v. Edwards,* 75 N. C., 82; *Hare v. Jernigan,* 76 N. C., 474; *Phifer v. Barnhart,* 88 N. C., 338.

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(213)

JOS. W. ETHERIDGE and another v. WILLIAM PALIN and wife and others.

Parol testimony is inadmissible to add to or alter a written contract.

ACTION for the recovery of damages, arising from alleged misrepresentations in the sale of a fishery, etc., tried before *Albertson, J.,* at the August Term, 1874, of PERQUIMANS, into which it had been removed from Dare.

In their complaint the plaintiffs alleged false representation or deceit on the part of the defendants in a sale of certain fishing materials, fully described in the written contract of sale, set out in the pleadings.

On the trial the plaintiffs offered the following parol evidence of the contract between the parties. This evidence was objected to by the defendants on the ground that the contract was in writing, and could not be varied or added to by parol testimony. His Honor overruled the objection, and admitted the evidence.

On 27 July, 1872, on Roanoke Island, William Palin, the defendant, offered to sell to the plaintiffs the fishing beach and appliances belonging to the same, which were owned by himself and the other defendants, from whom he had authority to sell, consisting of boats, windlasses, a seine, ropes, corks, etc., at the price of $5,000. At the time the plaintiffs expressed a willingness to purchase at a fair price, but that they were entirely ignorant of the quantity and quality of the materials belonging to the fishery—some ten miles distant—and that their purchase would depend upon the outlay necessary to be made to enable them to fish the beach the ensuing spring, exclusive of the purchase money. That the defendant William Palin represented that the seine, rope and corks were packed away in good order in a small room on the beach at the close of the last season; that he had personally superintended the fishing the preceding spring; that the capstans were in good order; that a half day's work of one carpenter would put the boats in order; and that the (214) addition of 300 yards of new seine and two coils of new rope would be all that was necessary to fish the beach with a seine of the usual length, say 1,600 yards, or thereabouts.

To this the plaintiffs replied, that if they purchased it would be done entirely upon the representation of defendant; whereupon, he said that he would guarantee the materials and appliances to be as he had described them. The payments were then agreed upon, and it was understood that the defendants were to close the trade by finally accepting or rejecting the offer of the plaintiffs on the Monday following.

On that day the same defendant, William Palin, notified the plaintiffs that he accepted the price upon the terms pre-

viously agreed upon. That he, the defendant, afterwards procured one Griffin to draw up the contract (as set out in the complaint of the plaintiffs) and presented the same to the plaintiffs, who read and accepted it; upon which the cash payment was made and the notes for the balance of the purchase money given. That before this written contract was accepted the plaintiff Brinkley declined to do so, or to comply with its terms, until the plaintiffs could personally examine the quantity of the materials they were purchasing, whereupon the defendant stated that they were put away in a small house; that a personal examination was wholly impracticable, and that he would not take the trouble to show them unless a sale was agreed upon; but that he would guarantee that the materials, etc., were in the condition and of the quality and quantity previously represented by him. That upon the faith of these representations alone the payments were made and the security given.

Evidence was also offered by the plaintiffs, which was objected to by the defendants, but admitted by the Court, that an examination of the seine and rope at that time would not determine their quality and value, because, being dry, it could not be determined until put into use, whether they were sound or not; that the said materials and appli-
(215) ances were afterwards found not to be of the quantity or quality represented; that the seine and rope were rotten; that of the fourteen capstans, ten were rotten and worthless, and had to be replaced with new ones; that the boats were unfit for use, and had to be repaired at much cost; that 700 yards of the seine, 14 coils of new rope and 300 corks had to be added to that purchased from defendants in order to fish a seine of the usual length, in the spring of 1873.

To all the foregoing verbal testimony, tending to add to or contradict the written contract, the defendants objected. His Honor admitted it and the defendants excepted.

The defendant William Palin, examined in behalf of himself and the other defendants, denied the alleged false representations sworn to by the plaintiffs, and his having made any guaranty as to the quantity or quality of the materials, etc., sold.

The jury, in response to certain issues submitted to them by the Court, found:

1. That William Palin did not make representations to the plaintiffs, or either of them, in regard to the quantity or quality of the materials, knowing the same to be untrue at the time the bargain was made.

2. That he did make representations which were in fact untrue at that time.

3. That the plaintiffs relied upon those representations, and that they were untrue in fact.

4. That the parties intended conditions of the sale other than those included in the written contract.

5. That the defendants guaranteed that the materials, etc., were of better quality than they really were.

6. And that the plaintiffs, on account of such wrongful representations, sustained damage to the amount of $1,100.

The plaintiffs had judgment, after a motion for a new trial, which was overruled. Appeal by defendants.

Moore & Gatling, for appellants.
Smith & Strong, contra.

PEARSON, C. J. The rule of evidence, "Parol tes- (216) timony is not admissible to add to a written contract," is so well settled and its importance in the administration of justice, both in courts of law and courts of equity, is so evident, that we are at a loss to see, aided by the argument of Mr. Smith, on what ground his Honor departed from it, and allowed the plaintiff, as a witness for himself, to swear that in addition to the written contract in regard to the fishery, seine, ropes, etc., the defendants had made a guarantee as to the quantity and quality of the materials which he had contracted to convey.

Upon the parol testimony, which his Honor admitted, the jury were justified in finding that the defendants did guarantee that the fishing materials were of better quality or more in quantity than actually was the fact.

If this guaranty as to quantity or quality can, by parol testimony, be added to the written contract, that is decisive. The case turns upon the question of evidence. As to which, the argument of Mr. Smith yields, there can be no doubt, unless the purpose of the action was to demand a reform of the written contract, on the ground of fraud, imposture or mis-

take, in regard to its execution, and the omission to insert a warranty as to quality or quantity. But there is no allegation of fraud, imposture or mistake in regard to the execution of the written contract, or the omission to insert a warranty as to the quality or quantity of the fishing materials, so as to invoke the equity jurisdiction of the Court. On the contrary, the complaint avers that the contract of sale between the plaintiffs and the defendants was reduced to writing, and a copy is appended as a part thereof, without any averment of fraud, imposture or mistake.

Mr. Smith then took the position, "When a party affirms as a fact, a matter which turns out not to be true, it makes no difference whether he knows it to be untrue or not." That is so; but it rests on the ground that as a part of the contract he undertakes and affirms that the matter is true, and this, as we have seen, is excluded by the terms of the written contract.

(217) In short, it is settled, when the gravamen is on a false *warranty* the plaintiff must prove a defect in the article, and also a warranty. When the gravamen is on a *deceit* the plaintiff must prove a defect in the article, and also the *scienter*, that is, that the party knew of such defect. In our case, that is excluded by the finding of the jury. His Honor seems to have been led into error by not adverting to this distinction; and the complaint is so drafted as to have led to the impression, and to make it impossible to say, whether the gravamen is on a false warranty or on a deceit.

PER CURIAM. *Venire de novo.*

Cited: Ray v. Blackwell, 94 N. C., 12; *Elliott v. Whedbee, Id.,* 119; *Nickelson v. Reves, Id.,* 564; *Ramsey v. Wallace,* 100 N. C., 82; *Bank v. McElwee,* 104 N. C., 308; *Coal Co. v. Light Co.,* 118 N. C., 236.

STATE v. WARREN PATRICK.

An appeal to the Supreme Court will be dismissed when the defendant files no appeal bond, and there is no order allowing him to appeal without, granted upon the usual affidavits of inability, etc.

INDICTMENT, larceny, tried before *Hilliard, J.*, at the Fall Term, 1874, of PITT.

The defendant was convicted on the trial below, and appealed. No bond accompanied the record, nor was there an order allowing the defendant to appeal without the usual security.

On the calling of the case in this Court, on motion of the Attorney-General, the appeal was dismissed.

No counsel in this Court for defendant.
Attorney-General Hargrove, for the State.

PER CURIAM. Appeal dismissed for want of appeal bond, or affidavit of inability.

Cited: S. v. Edney, 80 N. C., 363; *S. v. Walker,* 82 N. C., 696; *S. v. Donaldson,* 83 N. C., 683; *Stell v. Barham,* 85 N. C., 89; *S. v. Kearns,* 90 N. C., 651.

(218)

FRANCIS D. KOONCE v. DAVID S. DAVIS.

The order of a superior military officer of itself will not justify his subordinate in taking private property for public use. When, with such order, there is an immediate military necessity for such taking, the subordinate will be justified.

(*Bryan v. Walker,* 64 N. C., 141, cited and approved).

ACTION to recover the value of a buggy, tried at the Spring Term, 1874, of LENOIR, before *Clarke, J.*

The suit was originally commenced in Onslow Superior Court and removed to Lenoir upon affidavit.

The defendant was an officer, of the rank of major in the infantry service of the Confederate States, and impressed

from the plaintiff in the village of Kinston, in the spring of 1865, the buggy in controversy. On the trial in the Court below the case was submitted to the jury upon the following issues:

1. Did the defendant take the buggy of the plaintiff?

2. If he took said buggy, did he take it under the command of a superior officer?

3. Was there such a military emergency as to justify said taking?

4. Did defendant refuse to restore the buggy when ordered by the general in command?

The jury found the first three issues in the affirmative, and the fourth in the negative.

The material facts of the case are: The defendant was major in a regiment of Brigadier General Kirkland's Brigade; the general was sick, and told the defendant that he wished to be with his troops, as he was expecting an engagement with the enemy, and as he could not ride on horseback, nor go in an ambulance, that he must order a detail and take the buggy. The defendant did so, but he never saw the buggy and did not know whether it was taken or not, nor did he know the men who were detailed. His orders were given through a sergeant; that a buggy could go where an (219) ambulance could not; that the buggy was hitched to an army wagon and taken from Kinston; and that the Federal forces, before whom the Confederate forces were retreating, occupied the town a short time afterwards. That when General Kirkland ordered the buggy to be impressed, he said, in reply to objections made by the defendant, that he might as well have the buggy as the enemy. That immediately after the buggy was impressed an order was obtained from R. F. Hoke, the general in command, to restore said buggy, which order was read to the men who were hitching it to the ambulance; but there was no evidence that this order came to the knowledge of the defendant. That the taking the buggy, the obtaining and reading General Hoke's order, all took place in a period of ten minutes and at a space of seventy-five yards.

The plaintiff asked his Honor to charge the jury:

1. If the jury believed that General Hoke issued an order for the restoration of the property in controversy to the plain-

tiff, and the same was made known to any officer or private who had control of said property, then they should find for the plaintiff.

2. If the jury believed that General Hoke issued an order for the restoration of the property in controversy, and the said order was made known to, or that the defendant, Major Davis, had any grounds to believe such order existed, they must find for the plaintiff.

3. That in order to justify the defendant in taking the buggy on the ground of necessity, they must believe that the property taken was indispensably necessary for the support of the army, or that it would facilitate their retreat, as an organized army.

4. That the taking of a buggy to carry a sick officer was not such a necessity as would justify the defendant, unless he could prove the loss of the ambulance, or that sickness was so great in the army that the patients could not be transported in the ambulance; and there is no evidence before them of either.

These instructions his Honor refused, and charged (220) the jury:

That if they believed the defendant took the plaintiff's buggy for the military service, and not for his private or individual use, and there was necessity for the seizure, then, though he had no order from a superior officer, he was justified in so doing, and the jury would find for defendant.

That if the defendant seized the buggy by order of his superior officer, he was justified in so doing, and they would find for defendant. To this charge of his Honor the plaintiff excepted.

The jury returned their verdict in favor of defendant. Judgment accordingly and appeal by the plaintiff.

Hubbard and *Isler,* for appellant.
Smith & Strong, contra.

BYNUM, J. This case is governed by the decision of this Court in *Bryan v. Walker,* 64 N. C., 141. In that case the plaintiff recovered because the defendant failed to establish that the impressment was made under an urgent necessity for the public service, such as did not admit of delay, and

where the civil authority would be too late in providing the means which the occasion called for. It is not the order of his superior that justifies a military officer in doing an unlawful act; and if the defendant had rested his case upon that proposition he would have failed. But he went further, and the jury has found that there was a military necessity for the taking; and the facts set forth in the case fully warrant such a finding.

The impressment of the buggy by order of the defendant, in obedience to the command of General Kirkland, being justified by the emergency, the evidence fails to bring home to the defendant any notice of the order of General Hoke for its restoration to the plaintiff. He is, therefore, not affected by the disobedience and insubordination of others. The jury has found that the defendant had no notice of the
(221) countermanding order of General Hoke, and that he did not refuse the buggy.

The charge of his Honor was correct in law; and this verdict of the jury in favor of the defendant, upon all the issues, conclude the parties.

PER CURIAM. Judgment affirmed.

E. T. MOCKRIDGE v. W. H. HOWERTON, Secretary of State.

Before the Act of 21 January, 1870, Bat. Rev., ch. 41, sec. 2, non-residents had no right to make entries of, or take out grants for, the vacant land of the State. Since the passage of that act, a resident of another State coming into this State with the intention of becoming a *bona fide* resident, and entering vacant land, was of right entitled to receive grants for the same, *provided* he moved and settled here within the time required to perfect his entries.

ACTION FOR MANDAMUS against the defendant to issue certain grants, tried before *Watts, J.*, at chambers, in WAKE, on 15 January, 1875.

His Honor, at the hearing of this case, with the consent of the parties, found the facts substantially as stated in the opinion of the Chief Justice, and granted the prayer of the plaintiff by ordering a *mandamus* to issue to the Secretary of State,

commanding him to issue grants upon the entries made by the plaintiff.

From this judgment the defendant appealed.

Attorney-General Hargrove and *Smith & Strong,* for appellant.

Battle & Son, Shipp & Bailey and *Flemming, contra.*

PEARSON, C. J. The plaintiff, who was a resident (222) of the State of Pennsylvania, in 1872 came to this State with the purpose of settling here, and made entries of the land in question; he never abandoned his purpose, and in 1874 returned to this State with his family in time to perfect his entries by surveys and payment of the amount required by statute and taking out grants. The defendant refused to issue grants. We are of the opinion that the case of the plaintiff is covered by the letter and spirit of the Act of 1869-'70, Bat. Rev., ch. 41, sec. 2,* and that it was the duty of the defendant, without any discretion on his part, to have issued the grants. Before the act referred to it was the policy of the law not to allow any one who was a non-resident to make entries of vacant land and acquire title at the low prices fixed by statute. Non-residents had no right to make entries of, or to take out grants for, the vacant land of this State. But it was deemed wise in 1869-'70, for the purpose of encouraging persons to move and settle here, to relax the law to the extent of allowing persons who intended to settle in this State and become resident citizens, to make entries of vacant land before they had actually removed and settled here and to take out grants, *provided* they did remove and settle here within the time necessary to perfect their entries. This the plaintiff has done, according to the facts found, and he is entitled to grants, the

*NOTE.—The following is the act referred to:

SECTION 1. *The General Assembly,* etc., That all entries of land subject to entry by the laws of this State, made or to be made, by or for any person or persons who have or may come into the State with the *bona fide* intent of becoming residents and citizens thereof, shall be deemed and taken to be as good and effectual to all intents and purposes as if such entries had been made by a citizen or citizens of the State: *Provided,* that such enterer or enterers shall comply with the laws of the State in relation to such entries.

SEC. 2. That this act shall take effect from and after its ratification.

Ratified 21 January, A. D. 1870.

purpose of the statute being to allow one who had made up his mind to become a resident citizen of this State, and had in pursuance of such intent made entries of vacant land, reasonable time to go back to his former residence and make the necessary arrangements for removal. Of this in-
(223) dulgence the plaintiff had a right to avail himself, and he is within reasonable time, to-wit, the "two years" allowed for perfecting entries.

This construction of the Act of 1869-'70 does not remove the barrier against non-residents making entries and taking out grants for vacant lands, except in respect to such non-residents as at the time of making the entry intend to settle in this State and show *bona fides* by actually removing and settling here in time to perfect their entry, thus taking a middle ground between the absolute prohibition under the old law and a qualified permission of non-residents to make entries, to-wit, a *bona fide* purpose to remove, carried out by an actual removal. If this is not a proper construction, the act has no meaning and has no legal effect, for if only *resident* citizens are allowed to make entries under the Act of 1869-'70 it makes no change in the law at all. No error.

PER CURIAM. Judgment affirmed.

WILLIAM H. COFFIELD v. JAMES C. WARREN and others.

Where an order for a new trial was granted in favor of a defendant, and at the ensuing term was set aside at the instance of the plaintiff, the defendant had a right under sec. 133 of the Code of Civil Procedure to move to set aside the original judgment; and if in his discretion the facts justified it, the presiding Judge committed no error in granting the same.

MOTION to set aside a judgment, heard by *Albertson, J.*, at Spring Term, 1874, of CHOWAN.

The following are the facts as found by the Judge of the Court below and sent up to this Court as part of the record:

The case was first tried before his Honor, *Judge*
(224) *Watts*, and a jury, at Spring Term, 1873, when the jury returned a verdict for the plaintiff and the Court rendered a judgment in accordance therewith. The defendant

gave notice of a motion for a new trial during the term, which was accepted by the plaintiff, but the motion was not heard until the ensuing week at Perquimans Court; when heard, the motion was granted by *Judge Watts*, and the order setting the judgment aside duly signed and filed.

The term of Chowan Court at which the plaintiff obtained judgment was a protracted one, extending through the whole two weeks, and the last three days thereof were occupied by a tedious and complicated trial involving a very large amount. On the last day of this term and immediately after the trial of the cause before alluded to, the presiding Judge (*Watts*) remarked on leaving the bench that he did not intend to hear any further business. The defendant's counsel very soon thereafter sought the Judge for the purpose of having his motion for a new trial heard, but learned that he had gone in the country, from whence he did not return until night.

The common and tacitly understood custom among the lawyers of the Chowan bar has been to hear and finally act on all motions, orders, etc., which required action at that Court, but which failed to be heard or granted for want of time or other sufficient cause, during the next ensuing week at Perquimans Court.

During the next week, at Perquimans Court, the defendant's counsel sought the attorney of the plaintiff and proposed to take up and argue the motion in the Judge's room. To this the plaintiff's counsel did not object, but failed to attend at the time. The Judge heard the motion and granted an order for a new trial.

At the ensuing Fall Term (1873) the plaintiff moved to set aside the order of *Judge Watts* granting a new trial, because not made during the Spring Term (preceding) of the Court; and for judgment as originally rendered. The plaintiff's motion was granted; whereupon the defendant moved to set aside the original judgment in favor of (225) the plaintiff, entered at Spring Term, 1873, under the provisions of sec. 133, Code of Civil Procedure.

Upon consideration of the facts, his Honor being of opinion that under that section of The Code the defendant was entitled to such relief, granted his motion and set aside the original judgment.

From this order the plaintiff appealed.

Gilliam & Pruden, D. C. Winston and *Smith & Strong,* for appellant.

No counsel *contra* in this Court.

SETTLE, J. We think that his Honor had full power, under sec. 133 of the Code of Civil Procedure, to grant the order appealed from. And we further think, from the facts found by his Honor, that the ends of justice demanded the action which he took in the premises.

To maintain the position of the plaintiff would deprive the defendant of his right to move for a rule to show cause why a new trial should not be granted, when the facts show that he was in no default, but did all in his power to have his rule entered and argued.

We think his Honor has exercised a sound discretion in furtherance of justice.

PER CURIAM. Order affirmed.

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(226)

STATE on the relation of MARY HICKS v. KIRBY HIGGINS.

Proceedings in bastardy are not *quasi*-criminal, and the record of such proceedings may be amended in the Superior Court, as are records in other civil cases amended.

(*State v. Allison*, 61 N. C., 346; *State v. Ledbetter*, 26 N. C., 242; *State v. Thomas*, 27 N. C., 366, and *State v. Carson*, 19 N. C., 368, cited and approved).

PROCEEDINGS IN BASTARDY, tried before *Mitchell, J.,* at Fall Term, 1874, of ALLEGHANY.

Upon the trial below the defendant moved to quash the proceedings for defects apparent on the examination, and also because the Superior Court had no jurisdiction of the case in its present condition.

The examination was in the words:

STATE OF NORTH CAROLINA—Alleghany County,
Glade Creek Township.

This day, Mary Hicks personally appeared before me, William H. Joines, an acting justice of the peace in and for

said county, and made oath that she was delivered of an illegitimate child on 15 April, 1871; and that Kirby Higgins is the putative father of it.

MARY HICKS.

Sworn to this 13 April, 1874.

WILLIAM H. JOINES, J. P.

The objections, as insisted by defendant, to said examination, were:

1. It did not state that the relator was a single woman;
2. It did not state that she was a citizen or domiciled in Alleghany County;
3. It did not state that the child was born in Alleghany County, or liable to become a county charge.

The Justice who took the examination testified that (227) he prepared the affidavit before the relator swore to or signed it; and that no other facts were sworn to by her on such examination except those appearing in the affidavit. He further stated that, of his own knowledge, he knew that she did reside in said county of Alleghany.

Pending the defendant's motion to dismiss, the Solicitor for the State moved that the Justice be allowed to amend his proceedings, and to re-examine the relator, then present, and to insert such other facts in the examination as were deemed necessary to perfect it.

This motion of the Solicitor was resisted by the defendant:

1. Because the power of the Superior Court did not extend so far as to require the Justice to renew his examination of the woman.
2. That more than three years had elapsed since the birth of the child before the motion was made to re-examine.

His Honor overruled the motion to quash, and allowed the motion of the Solicitor to allow the Justice to amend upon a re-examination.

From this ruling of his Honor the defendant appealed.

No counsel for appellant in this Court.
Attorney-General Hargrove, contra.

SETTLE, J. All of the exceptions taken by the defendant to the rulings of his Honor in the Superior Court have been

before this Court in other cases, and have been decided adversely to the view now urged by the defendant. It is not necessary, under the bastardy law, to show affirmatively that the mother of the child was a single woman. *State v. Allison,* 61 N. C., 346.

If the supposed father moves to quash for any defects which may, consistently with the truth, be supplied at the instance of the State, it is competent to allow the necessary amendment. *State v. Ledbetter,* 26 N. C., 242; *State v. Thomas,* 27 N. C., 366.

(228) We suppose the defendant denies the power of the Court to make the amendment under the idea that proceedings in bastardy are *quasi*-criminal in their nature; but such is not the case. In *State v. Carson,* 19 N. C., 368, it is said: "Orders of justices in bastardy cases are police regulations, having for their object solely an indemnity of the county from money liabilities. They do not partake of the nature of criminal proceedings."

PER CURIAM. Judgment affirmed.

Cited: S. v. Bryan, 83 N. C., 612; *S. v. Peeples,* 108 N. C., 769; *S. v. Edwards,* 110 N. C., 512; *S. v. Liles,* 134 N. C., 737.

IVY SMITH v. SETH D. SMITH and others.

1. Before the adoption of the C. C. P., no rule of law was more clearly settled than the rule that a purchaser at a sheriff's sale (the judgment and execution being regular) acquired the title of the defendant in the execution.

2. How far this rule has been changed since the adoption of The Code of Civil Procedure, *quære.*

ACTION for recovery of a tract of land, tried before *Russell, J.,* at Spring Term, 1874, of DUPLIN.

On the trial in the Superior Court, the plaintiff showed a judgment in favor of Thomas S. Kenan, administrator, against one Blaney Williams, Ivy Smith and J. E. Smith, obtained in the late Court of Pleas and Quarter Sessions of Duplin County, at the January Term, 1868. Execution

regularly issued thereon, returnable to April Term of said Court, issuing 8 February, 1868, and was returned endorsed, "Indulged by plaintiff."

Execution again issued from April Term, 1868; (229) was placed in the hands of the Sheriff, 2 May, 1868, who levied it on the land in controversy and sold the same in July, 1868—the sale being postponed from day to day until the sale. The land was sold as the property of Blaney Williams and purchased by the said Thomas S. Kenan, the plaintiff in the execution. The plaintiff then offered as evidence the Sheriff's deed to Kenan, dated 25 July, 1868, and a deed from said Kenan and wife, of date 16 November, 1868, all of which were duly proved and registered in April, 1869.

It was admitted on the trial that the defendants, the Smiths, were in possession of the land in controversy as the tenants of the other defendant, Williams.

The defendants then offered in evidence a judgment in favor of the defendant Harper Williams against the said Blaney Williams, obtained at the Fall Term, 1867, of the Superior Court. Execution issued 9 January, 1868, which was returned by the Sheriff to the Spring Term, 1868, indorsed as follows: "Levied this execution upon the interest of Blaney Williams in 202 acres of land, situated," etc. "Returned to Court under ordinance of Convention." The defendants also showed that a *ven. ex.* issued on this levy, dated 2 April, 1869, under which the Sheriff sold the land, which was purchased by the defendant Harper Williams, who took a deed from the Sheriff, of date 17 February, 1873, and which was duly proved and registered.

It was agreed between the parties that if, from the foregoing statement of facts, his Honor should be of opinion with the plaintiff, he should instruct the jury to return a verdict in his favor, with damages against the defendants; if otherwise, the jury should find for defendants.

His Honor, being of opinion with the plaintiff, so instructed the jury, who returned a verdict in his favor against the defendants. Judgment in accordance therewith; appeal by defendants.

Stallings, for defendants. (230)
Kornegay, contra.

PEARSON, C. J. This case is governed by the law as it was declared to be before the adoption of the C. C. P. So the question as to how far the title of a purchaser of land at a sheriff's sale may be affected by a fair docketed judgment is not presented. Before the adoption of the C. C. P., no rule of law was more clearly settled than the rule that a purchaser at a sheriff's sale (the judgment and execution being (231) regular) acquired the title of the defendant in the execution. Any contest among the judgment creditors who claimed priority of lien affected merely the fund raised by the Sheriff's sale, and left the purchaser secure in his title. I will not take the trouble to make a "rehash" of the settled principles upon this subject, but will content myself by making a reference to the well-digested brief of the plaintiff's counsel, filed in the case, wherein he gives references to all of the cases upon the subject; and will leave the subject as to how far the law has been changed by the C. C. P., in respect to the title acquired by the purchaser under the first sale, made by authority of judicial process, to be settled when the point is presented by the facts of the case. There is no error.

PER CURIAM. Judgment affirmed.

Cited: Threadgill v. Redwine, 97 N. C., 245.

GEO. JNO. ROBINSON, Clerk Probate Court, v. DAVID I. EZZELL, Register.

1. *Fructus industriales* are chattels; and a conveyance of one's "entire crop of corn," whether growing or unplanted, is a chattel mortgage.

2. Whenever a person is compelled to pay a public officer in order to induce him to do his duty, fees which he had no right to claim, they can be recovered back.

ACTION to recover certain fees, commenced in a justice's court in the county of WAYNE, and carried by appeal to *Clarke, J.,* at chambers, 13 April, 1874.

The facts are substantially the following:

On 28 March, 1874, a paper-writing purporting (232) to be a chattel mortgage from one Collier to one Woodard, executed on 10 March, 1874, was delivered to the plaintiff, as Probate Court, for his certificate of probate, and for delivery to the Register of Deeds of said county, the defendant herein, to be recorded. The property conveyed in said mortgage was described therein as follows: "One sorrel mule and my entire corn crop for this year." The fees for probate and registration of the mortgage, demanded and received by the plaintiff, were those allowed by the Act of 1870-'71, ch. 277, for the probate and registration of chattel mortgages; the fees of the Register of Deeds being twenty (20) cents. On delivering the mortgage to the Register, the defendant, the plaintiff offered him the said fee of twenty cents collected as aforesaid, but he refused to receive it, alleging that the said instrument was not a chattel mortgage, as contemplated and intended in the said statute, inasmuch as part of the property therein conveyed, to-wit, the "corn crop," was parcel of the real estate; and for that reason he, the said Register, demanded a fee of eighty (80) cents, which is the amount provided by law for the recording of deeds in all cases, except those to which the act of Assembly applies. The plaintiff paid the difference, to-wit, sixty cents, under protest; and it is for the recovery of this balance (sixty cents) that he brings this action.

The Justice, considering the instrument to be a mortgage of realty as well as of personal property, gave judgment in favor of defendant. His Honor upon due consideration of the facts reversed the justice's judgment, and allowed the plaintiff to recover. From which judgment the defendant appealed.

Faircloth & Granger, for appellant.
Smith & Strong, contra.

RODMAN, J. It was properly admitted in this Court that a mortgage of a crop to be grown, either not planted or immature, was a chattel mortgage, and that the defendant was entitled to a fee of twenty cents only upon its registra-

(233) tion. Nothing is better settled upon authority than that *fructus industriales*, although still growing, or even if unplanted, are chattels. Benjamin on Sales, 95, 103, cites numerous cases to that effect upon the English Statute of Frauds.

The counsel for the defendant contends here, however, that the sixty cents here sued for was paid voluntarily, with a full knowledge of the facts, and therefore cannot be recovered.

The point was not taken below. The case was evidently made up to present the single question which the counsel admitted was against him. If the point were open to the defendant it is against him, for there was certainly evidence from which the jury might have found that the payment was not voluntary. Whenever a person is compelled to pay to a public officer, in order to induce him to do his duty, fees which he has no right to claim, they can be recovered back.

The defendant also contends that the plaintiff cannot recover, because he paid the excessive fee as agent of the mortgagee, who would be entitled to recover it. The plaintiff paid the fee as the friend, and in the interest of the mortgagee. But it does not appear that he had been requested to do so, or that the mortgagee subsequently ratified the act. The money paid was the plaintiff's own, and he is entitled to recover it.

PER CURIAM. Affirmed.

Cited: Cotten v. Willoughby, 83 N. C., 79; *Atkinson v. Graves,* 91 N. C., 101; *Wooten v. Hill,* 98 N. C., 52; *Gwathney v. Etheridge,* 99 N. C., 575.

(234)

CASPER LAIN v. GEORGE W. and JAMES W. GAITHER.

A person who borrows of another personal property, cannot avoid returning the same or paying for it by alleging that since he borrowed the property the owner has gone into bankruptcy, and the property belongs to his assignee.

(*Yarborough v. Harris*, 14 N. C., 40; *Bennett v. Roberts*, 15 N. C., 83; *Maxwell v. Houston*, 67 N. C., 305, and *Burnett v. Fulton*, 48 N. C., 486, cited and approved).

ACTION for the recovery of specific articles of personal property, tried before *Wilson, J.*, at Fall Term, 1874, of DAVIE.

On the trial in the Court below, the plaintiff, as a witness, stated that the defendants had borrowed of him a still and a number of still-tubs, and upon his demanding their return they had refused to give them up. On his cross-examination the counsel for defendants proposed to show that the title to the still, etc., was in the assignee in bankruptcy of the plaintiff, and that he, the plaintiff, had been declared bankrupt before the loan of said property. To this the counsel for the plaintiff objected, and the objection was sustained by the Court.

The defendant's counsel then, with the view to discredit the witness, the plaintiff, proposed to ask him if he was not a bankrupt, and if he had surrendered this property (the still, etc.) in the schedule filed by him as a bankrupt.

Counsel for plaintiff again objected; but his Honor allowed the question to be asked, remarking that it might be heard only to affect the credit of the witness. In answer to the question, the plaintiff stated that he had owned the still and tubs before he was declared a bankrupt; that the same were sold under an execution against his property by one W. B. Jones, an officer, before he went into bankruptcy; and that the articles were not enumerated in his schedule.

One of the defendants, examined as a witness, stated that the still, etc., had been borrowed, as alleged, from the plaintiff.

His Honor instructed the jury that if the defend- (235)
ants obtained possession of the property in contro-
versy by borrowing from the plaintiff, and had not surrendered possession of it when demanded of them, they

were estopped in this suit from denying the plaintiff's title. To this charge defendants excepted.

The jury returned a verdict in favor of the plaintiff. Judgment in accordance therewith, and appeal by the defendants.

Bailey, for appellants.
Smith & Strong and *Brown, contra.*

BYNUM, J. The general proposition is true, that he who acquires possession under another shall not deny the title of him under whom he holds, so as to prevent him from reassuming the possession. This, however, is not upon the strict principles of an estoppel, but upon one of morality and good faith analogous to it, which will be adhered to by the courts unless it will work injustice, and especially to the rights of third persons, the duty of protecting which has not been officially assumed by the defendant, but has been confided to him by the law. *Yarborough v. Harris,* 14 N. C., 40; *Bennett v. Roberts,* 15 N. C., 83. The application of the principles announced in these cases disposes of this action. The property sued for was borrowed from the plaintiff by the defendants, who seek to avoid the recovery by alleging title in some third person. This third person has not authorized the defendant to vindicate his title, and as to that defense they are officious intermeddlers with business that does not concern them. They do not pretend that they have any title, nor do they pretend to connect themselves with any third person who has a better title, or any title at all. The authorities cited by the plaintiff are fully to the point. *Maxwell v. Houston,* 67 N. C., 305; *Burnett v. Fulton,* 48 N. C., 486; Story on Bailment, secs. 110, 226, 193, 264; Big. on Estoppel, 426, 421.

PER CURIAM. No error.

Cited: Vinson v. Knight, 137 N. C., 413.

(236)

TIMOTHY F. LEE v. THE RALEIGH AND GASTON RAILROAD COMPANY.

Where the plaintiff contracted with the defendant, a common carrier, for the transportation of a number of horses, and the horses were placed in the defendant's cars, whose agent ordered a servant to lock the cars, and the servant was prevented from doing so by the agent of the plaintiff, and on the passage some of the horses were lost: *Held*, that the defendant was guilty of no negligence in failing to lock the door, and was not liable for the loss of the horses.

ACTION to recover the value of two horses, tried at the January (Special) Term, 1874, of WAKE, before *Tourgee, J.*

The facts, as agreed by counsel, are substantially as follows:

On 21 February, 1872, the plaintiff entered into a contract with the defendant as a common carrier, by which the latter agreed to transport fifteen horses and two mules from Raleigh to Portsmouth, Va., over the Raleigh and Gaston road and the Seaboard and Roanoke road for the price of one hundred dollars; and a receipt for one hundred dollars in the usual form, signed by the proper agent of the defendant, was exhibited by the plaintiff. In this receipt there was no stipulation for release of defendant's liability.

The horses and mules were placed on the defendant's cars at Raleigh, thirteen horses in one car, two horses and two mules in another—this division being made by order of plaintiff's agent. When the train arrived at Macon depot, during the night, it was discovered that one of the doors of the car containing the thirteen horses was open and that two of the horses were missing; these two were never delivered by the defendant to the plaintiff.

The defendant offered to prove an express verbal contract between the plaintiff and the agent of the railroad, whereby the plaintiff agreed, in consideration of a reduction of the freight, and free passes over the road to plaintiff's agent and servant accompanying the stock, that plaintiff would (237) assume all risk of injury to the stock while in course of transportation, and release the defendant from any responsibility therefor; and that in pursuance of such contract such reduction of freight and free passes were given.

The defendant further offered to prove that after the cars were loaded the proper agent of the defendant ordered one of defendant's servants to lock the door of the car in which were the thirteen horses, and that as said servant was proceeding to do so the agent of the plaintiff told him not to do so, as some one would ride in the car with the horses. The servant thereupon closed the door, but did not fasten it. No one in fact rode in the car, although a servant of the plaintiff did ride in the car with the two horses and two mules.

His Honor held that if defendant proved the contract as stated, such contract would reduce the responsibility of defendant from his liability as common carrier to that of an unpaid bailee, and that the defendant would only be liable for want of ordinary care and skill. The Court further held that a failure to properly fasten the door of the car in which were the thirteen horses, even under the circumstances proposed to be proved by the defendant, was a want of ordinary care and that the plaintiff was entitled to recover.

The only issue submitted to the jury was the value of the horses, which was found to be $510. Judgment accordingly, and appeal by defendant.

Batchelor, Smith & Strong and *Walter Clark,* for appellant.

Busbee & Busbee, contra.

PEARSON, C. J. The instruction assumes the special contract which the defendant offered to prove. We agree with his Honor in the opinion that the legal effect of this special contract was to discharge the defendant from liability as an insurer, in its character of common carrier, and leave it responsible only for an ordinary neglect as a carrier for hire.

We suppose his Honor to mean when he uses the
(238) words "unpaid bailee" a carrier who is not paid as a common carrier. Indeed, we incline to the opinion that without a special contract the law does not hold a common carrier liable as insurer against the accidents arising from the known habits of animals. Common sense, as well as the law, makes a distinction between the liability of a common carrier in respect to live-stock and dead things; the one does not move, but remains where it is put; the other may

kick and bite and lie down and cause general disturbance whereby some may be injured or pushed out of the car (as seems to have been in our case), so it would seem live-stock should occupy a middle ground between dead freight, merchandise and passengers, who have instincts of self-preservation and intelligence superior to live-stock.

The case, however, does not call for a discussion of this subject. Upon the point of negligence, which is the only point in our case, the instruction assumes the facts to be: When the horses and mules were put on the cars at Raleigh, two horses and two mules were put in one car and thirteen horses in another car, this division being made by order of plaintiff's agent. The agent and a servant went on the train to attend to the animals. After the thirteen horses were put in the car, and properly cared for, the proper agent of defendant ordered one of defendant's servants to lock the door, and as the servant was proceeding to do so the agent of the plaintiff told him not to do so, as some one would ride in the cars with the horses; the servant thereupon closed the door, but did not lock it. No one in fact rode in the car, but a servant of the plaintiff did ride in the car in which the two horses and the mules were put. On this state of facts his Honor held the defendant liable, by reason of a failure on the part of the conductor to have the door of the car properly fastened. We do not concur in this legal inference. Certainly it would be negligence on the part of a conductor if after seeing the horses put in a car he should fail to see that the door was properly fastened, in the absence of any facts by way of explanation; but we have facts by way of explana- (239) tion, to-wit, the conductor ordered one of his servants to "lock the door." This was prevented by an order of the agent of the plaintiff not to do so. "If the matter had stopped here, it might have been the duty of the conductor to have advised the agent of the plaintiff that it was imprudent to leave the door of the car unfastened, just as it would be his duty to advise a passenger that it was dangerous to jump off the train while in motion. Such advice would be prompted, if not by ordinary care for a passenger, at least by ordinary charity for one who was about to put himself in danger.

But the matter did not stop here, for the agent of the plaintiff goes on to give him reasons for not having the door locked,

to-wit: "Some one will ride in the car with the horses." This is, in effect, saying to the conductor, "I know as well as you do that the door ought to be fastened, but I will have a servant there to attend it." After this peremptory countermand of his orders by one having the control and management of the plaintiff's stock, the conductor was guilty of no negligence in leaving the matter in his hands, and the negligence, not "contributory," but *in toto,* was upon the plaintiff's agent; it was his duty to have put a servant in the car to attend to the horses; or if he changed his mind in regard to it, to have notified the conductor and requested him to have the door locked before the train started. There is error.

PER CURIAM. *Venire de novo.*

Cited: Land v. R. R., 107 N. C., 80; *Wood v. R. R.,* 118 N. C., 1063.

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(240)

JOHN W. B. WATSON v. ORREN L. DODD.

1. The weightiest considerations make it the duty of the courts to adhere to their decisions. No case ought to be reversed upon a petition to rehear unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the Court.

2. A contingent remainder is not subject to execution for the payment of a debt before the falling in of a preceding estate.

(*Watson v. Dodd,* 68 N. C., 528, affirmed).

PETITION TO REHEAR this case, decided January Term, 1873, and reported 68 N. C., 528. The facts of the case are fully stated in the report of the case at January Term, 1873.

Haywood and *Moore & Gatling,* for the petitioner.
Pou, contra.

PEARSON, C. J. The weightiest considerations make it the duty of the courts to adhere to their decisions. No case ought to be reversed upon petition to rehear unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the Court. Such is not the fact in this instance.

Watson v. Dodd, 68 N. C., 528, was decided upon full argument by counsel, and after full consideration by the Court, and must be treated as an authority by which the law is settled.

Mr. Haywood in his much elaborated, and, I will add, very able argument at this term, did not suggest any material point which has been overlooked by the Court; and was forced to admit that, after the fullest research, he has not been able to find any direct authority in support of the power of the Court to order a contingent remainder to be sold for the payment of a debt in a proceeding between the *immediate parties,* that is, creditor and debtor; and in cases where a third person, for instance, an heir charged with a specialty debt (241) taking a contingent remainder by descent, or an assignee in bankruptcy taking a contingent remainder by act of law, he was not able to find any instance where the contingent remainder was sold before the falling in of the preceding estate so that a clear title could be made to the purchaser, thus showing the policy of the law to be not to encourage *gambling* and *speculation* by the sale of a contingent interest, which is the reason given in the books for not allowing a contingent remainder to be assigned. Indeed, the argument suggested an additional reason for not selling a contingent interest, growing out of the provision for a homestead, made by the Constitution.

The docketed judgment is a lien upon the contingent remainder, if matters stand as they are now, until the falling in of the preceding estate. The defendant will take his homestead without question; if a sale is ordered now, his right to a homestead will be defeated, or at least greatly embarrassed. There is no error. Judgment against plaintiff for cost.

PER CURIAM. Petition dismissed.

Cited: Hicks v. Skinner, ante, 2; *King v. Winants,* 73 N. C., 563; *Haywood v. Daves,* 81 N. C., 9; *Lewis v. Rountree, Ib.,* 22; *Devereux v. Devereux, Id.,* 17; *Mizell v. Simmons,* 82 N. C., 2; *Ashe v. Gray,* 90 N. C., 138; *Lockhart v. Bell, Id.,* 501; *Ruffin v. Harrison,* 91 N. C., 78; *University v. Harrison,* 93 N. C., 85; *Dupree v. Ins. Co., Id.,* 239; *Fisher v. Mining Co.,* 97 N. C., 97; *Hannon v. Grizzard,* 99 N. C., 161; *Fry v. Currie,* 103 N. C., 206; *Gay v.*

Grant, 105 N. C., 481; *Tucker v. Tucker,* 110 N. C., 334; *Lumber Co. v. Lumber Co.,* 116 N. C., 745; *Meisel v. Cobb,* 122 N. C., 69; *Capehart v. Burruss,* 124 N. C., 50; *Weathers v. Borders, Id.,* 611; *Hodgin v. Bank,* 125 N. C., 503; *Hodges v. Lipscomb,* 128 N. C., 621; *Junge v. McKnight,* 137 N. C., 293.

STATE v. ALEXANDER QUICK.

1. A justice of the peace has jurisdiction to hear, try and determine the offense of keeping an unlawful fence.

2. Upon an appeal from the judgment of a justice in such cases it is unnecessary that the defendant should be tried upon an indictment found by a grand jury.

(*State v. Perry,* 71 N. C., 522, cited and approved).

CRIMINAL ACTION, keeping an unlawful fence in crop time, tried before *Buxton, J.,* at Fall Term, 1874, of CUMBERLAND.

The action originally commenced in the court of a (242) justice of the peace, upon the complaint of one Sikes, 31 August, 1874. The Justice, taking final jurisdiction, fined the defendant five dollars, from which judgment he appealed to the Superior Court.

The complaint filed in the Justice's Court contains the sworn statement, *"that this complaint is made by the party injured by the offense."* And upon the trial in the Superior Court, had upon the original papers, *i. e.,* without any indictment being found by the grand jury, upon the plea of "not guilty," before the petit jury, it was admitted that the defendant kept an unlawful fence around his cultivated fields in the county of Cumberland in the crop time during the month of June, 1874, and on the part of the State it was admitted that the prosecutor Sikes had received no injury by reason of the unlawful condition of the defendant's fence, and that there was no proof made before the Justice of any such injury.

Upon the facts thus agreed, the defendant insisted that he was entitled to an acquittal, because under ch. 33, sec. 119, Bat. Rev., as amended by the Act of 16 February, 1874

(Laws 1873-'74, ch. 176), it was still necessary both to allege in the complaint and to prove before the Justice that the complaint *"is made by the party injured by the offense";* that while the allegation is in the complaint, there was no corresponding proof, so that the Justice had no right to take final jurisdiction of the case and render the judgment appealed from; and further, that the Superior Court ought to dismiss the case, or enter a verdict of acquittal, or in some way discharge the defendant.

For the State it was insisted that the offense charged was one not necessarily injurious to any particular individual, and so came within the decision in *State v. Perry,* 71 N. C., 522; and that the Justice could have issued the warrant on the complaint of any one or upon his own knowledge.

The jury, upon the facts admitted and under the direction of his Honor, rendered a verdict of "Guilty."

The defendant moved in arrest of judgment that the (243) trial in this Court being *de novo,* the grand jury ought to have passed upon the case before submitting it to the petit jury. Motion overruled. Judgment, and appeal by the defendant.

Guthrie, for appellant.
Attorney-General Hargrove, for the State.

READE, J. The first point made by the defendant is that the justice of the peace had no jurisdiction "to hear, try and determine the cause," because the complaint was not made by the "party injured by the offense."

It is true that the statute does require, as one of the requisites to give a justice of the peace jurisdiction, that the "party injured" shall complain. And when there is a party injured, he must complain, else the Justice has no jurisdiction. But how is it in a case which has all the requisites to give the Justice jurisdiction except that the injured party does not complain, and that requisite is wanting because there is no injured party except in the sense that everybody, the public, is injured? In such case it would seem that any person ought to be allowed to complain; for, in a general sense, he is a party injured. As in this case the offense charged is keeping an unlawful fence, which is an offense against the

public, and of "evil example," although no person may suffer any particular or private injury. This view is sustained by what is said in *State v. Perry,* 71 N. C., 522.

II. The second point is that after the cause was taken to the Superior Court by the defendant's appeal from the judgment of the justice of the peace, he could not be put on trial in the Superior Court unless "on indictment found by the grand jury." This objection is founded upon Bat. Rev., ch. 33, sec. 62, "No person shall be arrested on a presentment of the grand jury; or put on trial before any court but on indictment found by the grand jury." And upon ch. 33, sec. 124, "In all cases of appeal (from a judgment of the justice of the peace) the trial shall be anew, without prejudice from (244) the former proceedings."

And the defendant insists that as he could not be tried in the Superior Court in a case originally there except upon indictment found, and as he was to be tried "anew" upon the appeal, without prejudice from the proceedings before the Justice, it follows that he could not be tried in the Superior Court upon the appeal unless a bill had been sent to the grand jury and found to be true. This was a new point and was forcibly put by the defendant's counsel; but still we think the position cannot be maintained.

It is not the statute alone that gives the justice of the peace jurisdiction and deprives the defendant of a constitutional right of trial by jury; but it is the Constitution itself which gives the jurisdiction. Const., Art. IV, sec. 33. And the statute aforesaid which gives the right of appeal and a trial "anew" in the Superior Court, does not mean that the complaint and the warrant and the arrest preliminary to his trial before the Justice shall all go for nothing, and in the Superior Court there must be a new complaint and a new arrest and a new trial, but only that the *"trial"* shall be "anew."

PER CURIAM. Judgment affirmed.

Cited: S. v. Crook, 91 N. C., 542; *S. v. Koonce,* 108 N. C., 754; *S. v. Thornton,* 136 N. C., 616.

WILLIAM S. JOHNSON v. JOSEPH DUCKWORTH.

The judgment of the Superior Court upon the facts relied upon to sustain a motion under sec. 133, C. C. P., to set aside a judgment as to the truth of such facts, is final. The judgment as to their sufficiency in law is subject to review.

(*Griel v. Vernon*, 65 N. C., 76, cited and approved).

ACTION for recovery of the value of certain cattle, tried before *Watts, J.*, at Fall Term, 1874, of HENDERSON.

The material facts of the case are fully set forth in the opinion of the Court. (245)

On the trial below the plaintiff had judgment, from which the defendant appealed.

M. E. Carter, for appellant.
J. H. Merrimon, contra.

SETTLE, J. This was a motion by the defendant to set aside a judgment, under sec. 133, C. C. P., which authorizes the Judge "at any time within one year after notice thereof, to relieve a party from any judgment, etc., taken against him through his mistake, inadvertence, surprise, or excusable negligence," etc. His Honor has found the facts relied upon by the defendant to constitute his excuse, and this Court has said in *Griel v. Vernon*, 65 N. C., 76, that his decision on this point is final. But he has also declared that the facts found by him do not in law constitute a sufficient excuse. This is a question of law, and his ruling upon it may be reviewed. What are the material facts? The defendant being sued at Spring Term, 1874, of Henderson Superior Court, applied to an attorney of said Court to draw his answer, but the attorney so applied to, being sick, procured his law partner, who resides within a few miles of the county-seat of Henderson, to draw and file defendant's answer, which was verified by the defendant, but not signed by the counsel.

At the trial term the original counsel of the defendant, who had been in the habit of regularly attending said Court, was not present, and no reason was given for his absence, but his partner, who filed the answer and who also was a regular attendant of said Court, was at home sick and thereby pre-

vented from attending Court. His Honor was informed that the answer was in the handwriting of said counsel, and that he was at home sick and desired that the case might be left over. The defendant was ignorant of the sickness and absence of his counsel, and was himself absent for the first three
(246) days of the term in consequence of the failure of an agent of a railroad to furnish transportation for some cattle as he had stipulated to do. But having returned without further loss of time than was occasioned by the mismanagement of the road, he finds that his case has been tried in the absence of his counsel, and immediately employs new counsel and gives notice of his intended motion to set aside the judgment which has been taken against him. These facts, as remarked by his counsel, make a stronger case for the defendant than the facts do in *Griel v. Vernon, supra,* where the Court says: "In this case the party retained an attorney to enter a plea for him; that the attorney should fail to perform an agreement to do such an act as that, we think may fairly be considered a surprise on the client, and that the omission of the client to examine the records in order to ascertain that it had been done was an excusable neglect." But the counsel for the plaintiff contended, under the authority of *McCulloch v. Doak,* 68 N. C., 267, that the defendant was not entitled to the relief sought, because sec. 133 of the Code of Civil Procedure refers to judgments rendered at a preceding term, and does not relate to what took place at the trial term. In that case the defendant's counsel moved at the trial term to vacate the judgment, because his Honor had charged the jury that the defendant, who was a witness for himself, had testified to a certain state of facts, when the witness alleged that he had testified, or intended to testify, to a different state of facts. The Court say that sec. 133 has no application to such a case, and we now reaffirm that decision. But his Honor who delivered that opinion adds an expression which was not called for by the case, and hence is of no binding authority. If a judgment may be set aside "at any time within one year after notice thereof" for any of the causes specified in sec. 133 of The Code, what inconvenience can arise from hearing and deciding the motion to set aside at the term in which the judgment is rendered? The reason assigned is, that no judgment is rendered until

all the questions raised at the term have been decided. But this reason is not satisfactory: on the contrary, if (247) a judgment may be set aside at any time within one year after notice thereof, *a fortiori,* it may be done at once.

We have noticed this point at length because it was pressed upon the argument, but in point of fact it does not appear from the record that the motion was heard and determined during the term at which the judgment was rendered; on the contrary, the case made for the Supreme Court states that the motion to set aside was "heard before his Honor at chambers, on the Fall Circuit, 1874." It is true the notice of the motion was given in open Court, but it does not appear from the case made for this Court that it was ever heard and determined in Henderson County. And notwithstanding his Honor remarked in open Court that the defendant's attorney could make the motion before *Judge Henry,* as he did not wish to be bothered with the case any more, still it does appear that he submitted to be bothered with it somewhere on the circuit, at chambers, and treated it as a motion made under sec. 133 of The Code, but denied the relief because he did not think the facts constituted a legal excuse, in which ruling we do not concur.

PER CURIAM. Judgment reversed.

Cited: Ladd v. Teague, 126 N. C., 547.

STATE on the relation of JOHN N. WHITFORD and wife v. WILLIAM FOY.

Where, upon appeal, an imperfect account was brought up to this Court, and the judgment of the Court below modified: *It was held,* that this Court has authority to refer such account to its Clerk, to be reformed so as to correspond with its judgment in such appeal.

ACTION on a guardian bond, tried at Fall Term, 1874, of CRAVEN, before *Seymour, J.*

This suit originally commenced at Spring Term, (248) 1866, and was before this Court at January Term, 1871 (see 65 N. C., 265), on exceptions, by plaintiffs and

by the defendant, to the report of the Clerk of the Court below, to whom it had been referred to state an account of the defendant's guardianship.

On the last trial in the Superior Court, the plaintiffs offered the judgment rendered in the Supreme Court at the said January Term, 1871, as evidence to the jury. To this the defendant objected, on the following grounds:

1. Because if the paper offered was asked to be regarded as a judgment it could not be so regarded, as it was not competent for the Supreme Court to render a judgment for any sum whatever upon an appeal from an interlocutory order or judgment of the Superior Court; and especially as no judgment for any sum had been rendered in the Superior Court.

2. That if said paper was offered as a report on an account taken in the cause, it was not such, as it did not profess to be such, or to be required by any reference; but was a statement by the Court that their Clerk had made a report to them of certain facts, which report was affirmed.

3. That there was no authority in the Supreme Court to refer the taking an account in an action at law to their Clerk; and that any facts reported by him, or account stated, were not evidence on which the Superior Court could act, and were not evidence at all to that Court.

4. That the Superior Court could not receive as evidence any account or report thereon, except made by its own referee, or the statement by consent of parties.

5. That said paper, whether regarded as a report or a judgment, was incomplete, as it assumes that there are notes in the hands of the defendant exceeding the amount which the defendant is allowed by said order to pay as cash in part satisfaction of the amount stated to be due.

These objections were overruled by the Court, and the defendant excepted.

(249) The defendant then offered to show that there were in the aggregate the sum of $23,000 in bonds, which, not being disposed of in said order or judgment or report, that he was entitled to show that fact in the cause; and further, that all of the notes in the hands of the defendant were taken in good faith by him as guardian for the exclusive benefit of his wards, and that all of said notes were good

when taken, and that all had been lost by the events of the late war, without laches or fault on the part of the defendant. The defendant further offered to show that he had tendered all of said notes to the plaintiffs as their property, and which they were bound to receive, but they had refused to so receive the same; and the defendant then insisted that he was not indebted to the plaintiffs, had committed no breach of his guardian bond, but that he had in all things faithfully performed the conditions thereof.

This evidence was objected to and ruled out by the Court, whereupon the defendant excepted.

The jury returned a verdict for the plaintiff. Motion by defendant for a new trial; motion overruled. Judgment, and appeal by defendant.

Haughton and *Battle & Son,* for appellant.
Smith & Strong, contra.

PEARSON, C. J. The question is: Action on guardian bond; pleas, general issue, conditions performed, award and satisfaction; reference to state the account; exceptions to the report; the Court sustains some of the exceptions and overrules others; appeal to the Supreme Court by both parties. In the Supreme Court some of the exceptions are sustained and others overruled, and thereupon the Supreme Court refers the account to the Clerk to be reformed; report filed; exceptions overruled; report modified by consent and confirmed and ordered to be certified to the Court below. Did the Supreme Court have power to refer the account, in order to have it reformed and confirmed, or was it the province of the Supreme Court merely to pass upon the exceptions (250) and order its declarations of opinion in respect to the exceptions filed in the Court below, to be certified?

In the Superior Court the reception of the account, as reformed and confirmed, was objected to on the ground that the Supreme Court acted *ultra vires* in having the account reformed and making the order confirming the report, and so the record of the Supreme Court certified by the Clerk, and offered in evidence upon the question of damages, ought to be treated as a nullity.

A jury is not a competent tribunal to take an account. For this reason, in actions on the bonds of guardians, the Court is authorized to refer the matter of account to a commissioner "who shall state an account, under the same rules and regulations as are provided for stating accounts in courts of equity, and his report, when confirmed by the Court, shall be conclusive of the amount of the plaintiff's demand." Rev. Code, ch. 31, sec. 114.

In this case, exceptions were filed to the report of the commissioner, both on the part of the plaintiff and of the defendant; his Honor in the Court below sustained some of the exceptions and overruled others; and both parties being dissatisfied with his ruling, he allowed them to appeal, and the report of the commissioner was not reformed according to his rulings, and there was no confirmation of the report, so the account when it left that Court was in an unfinished state.

The exceptions and the rulings of his Honor in regard thereto, after full argument and consideration by this Court, were, as to some, sustained, and as to the others overruled, and a reference was made to the Clerk here to reform the account; and upon the coming in of his report, after certain modifications by the consent of the attorneys of the parties, the report was confirmed and it was ordered that the opinion of this Court, together with the account as reformed and confirmed, should be certified to the Court below. It was necessary to have the account reformed in order to make it con-
(251) form to the ruling of this Court. This could be more readily done under the supervision of this Court, where the exceptions had been finally disposed of, than it could be in the Court below, upon a certificate of the ruling of this Court, in respect to the exceptions, and in pursuance of the rules and regulations provided for stating accounts in courts of equity. The report was reformed and confirmed here, instead of being reformed and confirmed in the Court below, according to the directions of the Court here certified to the Court below.

Such has been the mode of procedure during my experience in regard to the construction of the statute allowing a reference in actions on guardian bonds to state the account as a rule of damages.

The appeal from the *ruling* of the *Judge* below was not treated as an appeal from the interlocutory judgment, sentence or decree at law or in equity of the Superior Court, but under the rules and regulations provided for stating accounts in courts of equity was adopted as a mode of coming to a final settlement of complicated accounts; otherwise the appeal must have been dismissed, because there had been no interlocutory judgment, sentence or decree, at law or in equity.

No authority or precedent was referred to in support of the position contended for, in regard to the statutes regulating appeals, so long usage and the reason of the thing turn the scales.

Assuming that, according to the strict construction of the several statutes in regard to appeals, in spite of the precedents and long usage, there was irregularity in having the account reformed, then, instead of giving instructions by which it should be reformed in the Court below, the more orderly mode of proceeding was by a petition to rehear in this Court; the order directing the Clerk to reform the account, especially as the reference to reform the report made in this Court was pending, and the counsel for both parties had concurred, and taken part in the proceedings to have the account reformed in this Court for many terms. (252)

The counsel for the defendant takes the position that he had a right to make the objection in the Court below, and disclaims all intention of disrespect or want of subordination. He certainly had a right to make the objection to the admissibility of the evidence in the Court below, and we never for a moment entertained the idea that any disrespect or insubordination was intended; on the contrary, we are satisfied that his client is about to be subjected to a heavy loss, owing, in a great measure, to the results of the war, and we account for this last effort on the principle, "a drowning man will catch at a straw."

There is no ground on which to arrest the judgment; it is for the penalty of the bond to be discharged by payment of the damages. Any error in the calculation of interest here is not ground for arresting the judgment. No error.

PER CURIAM. Judgment affirmed.

Cited: Whitford v. Foy, post, 253.

STATE on the relation of JOHN N. WHITFORD and wife v. WILLIAM FOY.

(Same syllabus as in the next preceding case).

The facts of this case are the same as those of the preceding. The defendant appealed from the same rulings against him, and the decision of this Court is the same, the Chief Justice referring to his opinion in that case as his opinion in this.

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(253)

STATE on the relation of JOHN N. WHITFORD, admr. de bonis non of FRANCIS T. WILLIAMSON, v. WILLIAM FOY.

(For syllabus see the preceding case, page 247).

The facts of this case, and the rulings of the Court below appealed from, and the decision of this Court, are identically the same as they are in the preceding case of *Whitford v. Foy;* and to the opinion delivered therein the Chief Justice refers.

STATE v. W. A. and GEORGE WRAY.

A druggist who in good faith and with due caution sells as a medicine by the direction of a practicing physician, spirituous liquors in a quantity less than a quart, is not indictable therefor.

BYNUM, J., *dissenting.*

INDICTMENT for retailing spirituous liquors without a license, tried at Fall Term, 1874, of CLEVELAND, before *Schenck, J.*

The facts, as found by the jury before whom the case was tried in the Court below, are fully stated in the opinion delivered by *Justice Settle.*

His Honor being of opinion from the facts found, that the defendants had committed no indictable offense, gave judgment accordingly; from which judgment of acquittal the Solicitor for the State appealed.

Attorney-General Hargrove, for the State.
No counsel in this Court for the defendants. (254)

SETTLE, J. The defendants being indicted for retailing spirituous liquors without a license so to do, the jury rendered the following special verdict: "The defendants were druggists and partners in the town of Shelby, and kept medicines for sale, but had no license to retail spirituous liquors. In the month of July, 1872, Dr. O. P. Gardner, a practicing physician in the town of Shelby, prescribed the use of a half pint of French brandy for Mrs. Durham, the wife of the witness, Hill Durham, and directed the witness to go to the defendants for it. That Dr. Gardner also went to the defendants and directed them to let the witness have the said brandy for his wife as medicine. The witness then went to the defendants and purchased the half pint of French brandy, and his wife used it as medicine. That French brandy is a spirituous liquor; that it is also an essential medicine, frequently prescribed by physicians, and often used, and that in this case it was bought in good faith as a medicine, and was used as such."

The letter of the law has been broken, but has the spirit of the law been violated? The question here presented has been much discussed, but it has not received the same judicial determination in all the States in which it has arisen. In this conflict of authority we shall remember that the reason of the law is the life of the law, and when one stops the other should also stop.

What was the evil sought to be remedied by our statute? Evidently the abusive use of spirituous liquors, keeping in view at the same time the revenues of the State. The special verdict is very minute in its details, and makes as strong a case for the defendants as perhaps will ever find its way into court again. A physician prescribes the brandy as a medicine for a sick lady, and directs her husband to get it from the defendants, who are druggists. It may be that a pure article of brandy, such as the physician was willing to administer as a medicine, was not to be obtained elsewhere than at the defendants' drug-store. The doctor himself goes to the defendants and directs them to let the witness have the brandy as a medicine for his wife. And the further fact is found,

(255) which perhaps might have been assumed without the finding, that French brandy is an essential medicine, frequently prescribed by physicians and often used; and the further and very important fact is established, that in this case it was bought in good faith as a medicine, and was used as such. After this verdict we cannot doubt that the defendants acted in good faith, and with due caution, in the sale which is alleged to be a violation of law.

In favor of defendants, criminal statutes are both contracted and expanded. 1 Bishop, par. 261. Now unless this sale comes within the mischief which the statute was intended to suppress, the defendants are not guilty; for it is a principle of the common law that no one shall suffer criminally for an act in which his mind does not concur. The familiar instance given by Blackstone illustrates our case better than I can do by argument. The Bolognian law enacted "that whosoever drew blood in the street should be punished with the utmost severity." A person fell down in the street with a fit, and a surgeon opened a vein and drew blood in the street. Here was a clear violation of the letter of the law, and yet from that day to this it has never been considered a violation of the spirit of the law. Perhaps it will give us a clearer view of the case if we put the druggist out of the question, and suppose that the physician himself, in the exercise of his professional skill and judgment, had furnished the liquor in good faith as a medicine. Can it be pretended that he would be any more guilty of a violation of our statute than the surgeon was guilty of a violation of the Bolognian law? We think not.

But we would not have it understood that physicians and druggists are to be protected in an abuse of the privilege. They are not only prohibited from selling liquor in the ordinary course of business, but also from administering it as a medicine unless it be done in good faith, and after the exercise of due caution as to its necessity as a medicine. The sale of liquor without a license, in quantities less than a quart,
(256) is *prima facie* unlawful, and it is incumbent upon one who does so sell to show that it was done under circumstances which render it lawful. In this case we think

such circumstances have been shown, and we concur in the judgment of his Honor that the defendants are not guilty.

PER CURIAM. Judgment affirmed.

Cited: S. v. Wool, 86 N. C., 709; *S. v. McBrayer,* 98 N. C., 622; *S. v. Dalton,* 101 N. C., 682; *Randall v. Railroad,* 107 N. C., 753; *S. v. Brown,* 109 N. C., 807; *S. v. Downs,* 116 N. C., 1067.

GEORGE W. HUDGINS v. C. W. WOOD.

1. A written agreement between A and B and C, that B and C are to cultivate A's land, who is to pay them one-half the crop as wages, after deducting advances, constitutes B and C croppers and not tenants.

2. B and C have an interest which they can assign, subject to the charge of A for advancements; and such assignment in writing is not necessarily a mortgage or in the nature of one, and need not be registered.

ACTION, tried by *Albertson, J.,* a jury being waived, at the August Term, 1874, of PERQUIMANS.

In his complaint the plaintiff alleges that during the year 1873 certain parties cultivated a crop of corn and cotton upon the farm of the defendant as his tenants upon the terms following, to-wit: One-half of the crops raised was to belong to said tenants and the other half to defendant; that the tenants raised during the year 2,700 pounds of lint cotton, one-half of which was their property.

Plaintiff further alleged that in the spring and summer of said year the said tenants purchased of him goods to the amount of $25 each, for which they gave their notes and secured the same by making to the plaintiff their several chattel mortgages according to the statute and in substance as follows:

"I, G. H., of the county of, etc., am indebted to George W. Hudgins (the plaintiff) in the sum of $25, for which he holds my note, etc., and to secure the payment of the same, I do hereby convey unto the said George W. Hudgins all my in-

terest in my growing crop of cotton and corn on the
(257) farm of C. W. Wood (the defendant), of same county,
etc., but on this special trust: that if I fail to pay said debt and interest on or before 1 November, 1873, then he may sell said interest at public auction for cash," etc. Which chattel mortgages were duly registered. That the said tenants failed to pay their several notes, nor have they ever paid them or any part thereof; that the whole of the crops so raised by said tenants were gathered and housed by them under the direction of the defendant, and was by him ginned and baled in bulk, without separation of the shares of said tenants from his own, and that plaintiff had been informed that he, the defendant, was about to ship the same to market as his own and in his own name, when in consequence of such information he, the plaintiff, made demand in writing upon defendant for said tenants' several shares of said crop, at the same time calling his attention to his lien, and forbidding him to ship, etc.; that notwithstanding his notice, the defendant did ship said crop, sell the same and apply the proceeds to his own use.

Whereupon the plaintiff demands judgment, etc.

In his answer the defendant alleged, and it was not denied, that his contract with the tenants named in the complaint of the plaintiff was in writing and signed by all the parties interested therein; and which agreement, or the parts thereof material and bearing upon the points decided in this Court, are substantially as follows:

"This agreement made, etc., between C. W. Wood of the one part and (the said tenants, colored) of the second part, witnesseth: That the parties of the second part agree to work for the said Wood on his farm during the year 1873, or so much thereof as may be necessary to cultivate well fifty acres of land. They bind themselves to be prompt, etc.; they also agree to cultivate (a further quantity) in corn. In payment of said services faithfully rendered, the said Wood agrees to furnish them land, teams and farming implements, necessary feed for teams and quarters to live in, with a garden, and give
them one-half of all the cotton, corn and fodder that is
(258) grown upon said land during the year 1873. The said
parties of the second part agree to cultivate well the said land, to clean out and trim the ditches and to repair the

fences; failing in this, the said Wood reserves the right to hire other labor to do it, which shall be paid for out of their portion of crop.

"It is agreed that the said Wood shall have control of the whole crop until all accounts between the contracting parties are adjusted; the crop to be delivered in his barn and the cotton ginned and divided as they may agree, either cotton in the seed or ginned and shipped together and the proceeds divided; it is also agreed that the parties are to do their ratable part of taking care of the teams, etc., and that the cultivation of the crop is to be directed by said Wood. The said Wood agrees to furnish provisions to the parties of the second part at fair market prices, also to furnish seed corn," etc.

Defendant further states in his answer that, in pursuance of that agreement, the crop of cotton was gathered and ginned, and sold by him, and the proceeds placed to the credit of the parties of the second part, upon their several accounts with him for the provisions furnished to them by him during the said year of 1873, in accordance with the terms of said agreement; and that after so crediting their accounts with all the proceeds due and coming to them, they still remained in his debt in the sum of $29, or thereabouts.

The replication to the answer admits the written contract, but insists that the parties therein alluded to did by that instrument each acquire such an interest in the crops cultivated by them as was legally assignable. That said contract was executed between the parties thereto before any crop was planted, and the attempt to convey the tenants' interest therein to the defendant was void, for the reason that no crop was *in esse* at the time the contract was signed. That the conveyance of said interest in the crops to secure advances made, or to be made, was also void, the same not stating particularly the sum to be advanced, nor having been registered as required by the statute. That the mortgages made to the plaintiff were executed by the tenants and reg- (259) istered subsequently to the time of planting the crops and when the same was up and growing; and that said mortgages did legally convey all the interests of the tenants to the plaintiff.

His Honor, upon a consideration of the pleadings, being of opinion with the defendant, gave judgment accordingly, whereupon the plaintiff appealed.

No counsel in this Court for appellant.
Smith & Strong, contra.

RODMAN, J. It clearly appears from the written contract between the defendant and Ferebee, and the other so-called tenants, that in fact they had no estates in the land or in the crop to be raised on it, and no interests except those arising out of the executory contract of the defendant to pay them one-half of the crop, or of its value, as wages, subject to the deductions stated in the contract. They were not tenants, but merely croppers. They had interests which they could and did assign to the plaintiff, but the value of those interests could be ascertained only after deducting the lawful charges of the defendant; and it seems that after this deduction nothing is left.

The contract between the so-called tenants and the defendant was not a mortgage nor in the nature of one, and it required no registration. The title, possession and control of the land and crop continued by it in the defendant, although the other parties (Ferebee and others) had by statute a lien for such wages as might become payable to them according to its terms, and these have been paid, so that nothing is due to the plaintiff.

PER CURIAM. Affirmed.

Cited: Rouse v. Wooten, 104 N. C., 231.

(260)

JAMES E. BOYETT v. ARCH. BRASWELL.

1. Before a plaintiff can recover in an action for an alleged breach of contract, he must show either that he has complied with the contract or has been relieved from complying by the conduct of the defendant.

2. An agency to receive certain articles of personal property is no evidence of an agency to dispense with the delivery of such articles.

ACTION for recovery of $200, commenced in the court of a justice of the peace, and carried by appeal to the Superior Court of EDGECOMBE, and tried before *Moore, J.*, at the July Term, 1874.

On the trial below the plaintiff testified that one Brantly had purchased a steam saw-mill of the defendant, and that he, Brantly, made a contract with him (Boyett, the plaintiff) for the hauling of 200,000 feet of timber, at forty cents per hundred—Brantly, who was insolvent, telling him that the defendant was to pay the money for the hauling. That witness went to defendant and told him of the bargain, and asked if he would pay the witness the money if the hauling was done; that after some talk about the price—the defendant saying that it was too much, that thirty cents was good pay—he agreed to pay according to Brantly's contract, if witness would give him, Braswell, no further trouble. That he, the plaintiff, then hauled one day, and then sublet his contract to one Vanhook for thirty cents per hundred, or $600. Plaintiff further stated that in this contract he was to furnish provender for his, Vanhook's, oxen; that he saw Brantly about Vanhook, and that Brantly agreed that if Vanhook was remiss in hauling the logs, to give plaintiff notice. That shortly after this, witness heard from Vanhook that he was nearly out of provender for his oxen; that he went to the mill and Vanhook was absent; that he left $15 with one Leggett for Vanhook; and that he, the plaintiff, heard nothing more from the matter until some time thereafter at a preaching on a Sunday, when he asked Vanhook how he was getting on, when Vanhook told him that he, the witness (and plaintiff) (261) was out of it, and that he was working under a new contract with Braswell. That no one gave him notice of

Vanhook's purpose to stop work, or of the new contract with Braswell, the defendant, until Vanhook told him of it as above said.

Braswell, the defendant, testified that he sold the mill to Brantly and Kitchen, irresponsible parties, and was to reserve the title to the same until they paid 140,000 feet of lumber; that he was to have nothing to do with running the mill, nor furnishing logs, nor was Brantly authorized to make any contract for him. That Boyett, the plaintiff, came to him and told him that he made a contract with Brantly to deliver 200,000 feet of lumber at the mill for forty cents per hundred; that he, the defendant, said to him: "Well, look to Brantly for your pay"; that Boyett answered that Brantly said that he, the witness, was to pay; that he then told Boyett that he was willing to pay thirty cents, which was as much as the work was worth, and that he, Boyett, must look to Brantly for the other ten cents. This Boyett declined, and the witness then said to him: "Well, if you will put 200,000 feet of lumber on the mill and give me no further trouble, I will pay you $800 when the lumber is on the yard."

It was also in evidence that Vanhook worked several yoke of oxen and a large number of hands, sufficient to supply the mill; that Leggett returned to Boyett the $15 left with him for Vanhook, stating to him, Boyett, that Vanhook said he could not get along with this small amount; that this return of the money was after Vanhook told Boyett at church that he was out of it. That Boyett also said to Leggett, when this money was refunded, that he was going to stop hauling. It likewise appeared that Vanhook and one Hearne, who, in the meantime had purchased an interest in the mill, went to the defendant, Braswell, who, at the instance of Hearne, employed Vanhook at thirty cents per hundred, or $600—Hearne telling Braswell at the time that Boyett would not furnish Vanhook the means to carry out his sub-contract.

(262) It was also stated that before Boyett gave the money to Leggett, one Hearne told Boyett that Vanhook said he must have more provender or he would have to stop.

His Honor, amongst other instructions, charged the jury that it was a question for them, upon the foregoing evidence, whether Brantly was Braswell's agent to receive the lumber; that if he was, then he had the right as receiving agent to

arrange about the manner of delivery; and if he agreed to give Boyett notice, and Braswell made a new contract with Vanhook before Boyett was put in default by notice, the plaintiff would be entitled to recover.

The jury returned a verdict for the plaintiff. Motion for a new trial; motion overruled. Judgment, and appeal by the defendant.

John L. Bridgers, Jr., for appellant.
Perry, contra. (263)

READE, J. The plaintiff cannot recover for an alleged breach of contract on the part of the defendant without showing that he, the plaintiff, had complied with his part of the contract; or without showing that he had been relieved from complying by the conduct of the defendant. Here, then, is no pretense that the plaintiff had complied, and the only question is whether he had been relieved from complying by the conduct of the defendant. (264)

The plaintiff says that one Brantly, to whom the defendant had sold his saw-mill, and who was to pay defendant for it in lumber, promised the plaintiff that if Vanhook, who was the plaintiff's agent to deliver timber in compliance with plaintiff's contract with the defendant, should be "remiss" in delivering the timber, he, Brantly, would notify the plaintiff of it, so that the plaintiff might himself deliver it; and that Brantly never gave him any such notice.

It is clear that nothing which Brantly said or did can affect the defendant unless he was the defendant's agent to say or do that thing. And here there is *no evidence* that Brantly was authorized to say or do anything to relieve the plaintiff from his undertaking to deliver 200,000 feet of timber or saw-logs at the mill. The plaintiff says that the fact that Brantly was in possession of the saw-mill and was to receive and saw the logs, is some evidence from which the jury might infer that Brantly was the agent of the defendant. Grant that to be so, yet for what purpose was he the defendant's agent? Agent to receive the timber.

And, then, his Honor charged the jury that if Brantly was the defendant's agent to receive the timber, then he was his agent to make the promise to notify the plaintiff of the re-

missness of Vanhook, the plaintiff's agent; and that a breach of that promise by Brantly relieved the plaintiff from his contract with the defendant to deliver the timber, and authorized the plaintiff to recover of the defendant, just as if he had delivered it.

The proposition cannot be maintained that an agency to *receive* is evidence of an agency to *dispense* with the *delivery. Hence,* there is no direct evidence of any agency at all; and the plaintiff only insists that the fact that Brantly was in possession of the mill when the logs were to be delivered is some evidence of his agency to receive. Grant that to be so. Then if the plaintiff had shown that he had carried the logs and offered to deliver them, and the agent would not re-
(265) ceive them, he might with force have insisted that he had complied with his contract to deliver.

The plaintiff seeks to give merits to his case by the consideration that if he had had notice of the default of his agent, Vanhook, he would have complied with the contract by delivering the logs himself. But he fails upon the merits; for although Brantly did not notify him, yet Vanhook did; and that was better. The plaintiff failed to furnish Vanhook with food for his oxen as he had agreed to do, and therefore Vanhook could not haul the logs, and notified the plaintiff that he "was out of it."

Our conclusion is that his Honor ought to have charged the jury that there was no evidence that the plaintiff had complied with his part of the contract, or been relieved from complying, and therefore the plaintiff was not entitled to recover.

PER CURIAM. *Venire de novo.*

S. T. SPEER, assignee of W. W. LONG and W. J. DICKSON, v. C. J. COWLES.

Where a defendant agrees to deliver certain goods, with a proviso that the agreement shall be void in either of two events, such condition is a subsequent one, and on the trial it was incumbent on the defendant to show that at least one of the events which was to avoid the agreement had occurred.

ACTION, on a written contract, commenced in 1863; and tried by *Wilson, J.*, at Fall Term, 1874, of YADKIN.

The plaintiffs originally declared in *assumpsit* for damages arising from an alleged breach of the following written contract:

"Memorandum of a trade between J. & C. J. (266) Cowles of the first part, and W. J. Dickson and W. W. Long of the second part, witnesseth: That the persons of the first part engage to and sell to them of the second part four hundred dry hides, of the quality denominated butchers' hides, in Charleston, less one thousand pounds sold to another party, balance supposed to weigh from seven thousand (7,000) to eight thousand (8,000) pounds, on the following terms, to-wit: The parties of the first part agree on their part to deliver the hides above described within sixty days, and as soon as the nature of the case will allow, at Freeland's Depot, on the A., T. and O. R. R., at one dollar and ten cents per pound, and such further sum as will cover cartage, freight, etc., expenses incident to transportation from Charleston, S. C.; and they hereby acknowledge the receipt of four thousand dollars towards their advance payment. They of the second part promise to receive said hides at the time and place recited, and to pay for them in Confederate money on delivery, first receiving the amount advanced for. The weights to be ascertained by weighing the bales at the depot, a bale at a draft. It is expressly understood that if by any accident or want of integrity on the part of those furnishing the hides to the party of the first part, they should not reach the point above designated for delivery, the said parties of the first part are to be exonerated, and they of the second part are only to expect and receive such as may get through, and claim no damage. This is in view of the exposed situation of Charleston. If the hides

delivered do not amount to the money advanced, the balance of the funds are to be refunded promptly.

J. & C. J. COWLES,
W. J. DICKSON,
W. W. LONG,
Per DICKSON.

Witness: P. C. HALL.

The defendants pleaded the general issue, and that
(267) the contract was illegal. There was much evidence offered on the trial below to establish the allegations of the plaintiffs, as well as to support the pleas of the defendants, which, not being pertinent to the points decided in this Court, need not be stated.

Upon the question of illegal consideration many instructions were asked by the defendant, all of which, the case stated, were substantially given as requested, except the following:

"If the plaintiffs contracted for the hides, without any illegal intent at the time, yet if they afterwards used them in filling the contract to furnish leather to the Confederate Government, then the contract sued on would be illegal." This his Honor declined to give, and the defendant excepted. The defendant asked his Honor to construe the alleged written contract, and to instruct the jury that the meaning of the contract is that the defendants undertook to furnish the four hundred dry hides of the quality denominated butchers' hides, in Charleston, after first supplying one thousand pounds to another party, if the parties in Charleston who had agreed to furnish the hides to defendant complied with their contract and furnished the hides to defendant, but that if from any want of integrity, or if from any accident, the parties in Charleston from whom defendant had contracted for hides of the quality described failed to deliver the hides, the defendant would be exonerated and the plaintiff would not be entitled to any damages; but the Court declined to so instruct the jury, but told the jury that, as the contract was in writing, it was for the Court to construe it, and he instructed the jury that if the defendant by reasonable effort could not procure butchers' hides in Charleston within the time given him in the contract to deliver them, or if the defendant, on account of the

demands of the government, then existing, on the railroads, could not procure transportation by railroad from Charleston to Freeland's Depot on the A., T. and O. Railroad, then that in either of these events the defendants by the terms of the contract would not be liable to the plaintiffs for damages in this suit. But that defendants were required (268) to make some effort to procure the hides and to obtain transportation for them to fulfill their contract, and that defendant would not be excused by reason of the fact that the hides of the quality contracted for by the plaintiff had advanced in price in Charleston so much that defendants would sustain a loss in complying with their contract.

Verdict for the plaintiff. Rule for a new trial; rule discharged, and judgment.

Graves, for appellants.
McCorkle and *Bailey, contra.*

RODMAN, J. No exception appears to have been taken in the Superior Court to the charge of the Judge upon the meaning and effect of the contract declared on. Consequently, none can be properly taken here. The exception to the Judge's refusal to charge as requested by the defendant on the illegality of the contract was (properly, we think) not pressed here. It is only by an indulgence that we can consider the errors which the defendant assigns to the instructions of the Judge as to the effect and meaning of the contract, so far as appears from the record, for the first time in this Court.

We find no error in these instructions. We agree with the counsel for the defendant that the obligation of the defendant to deliver the hides was conditional, and was to be void if he was unable to do so, either by the failure of the persons in Charleston with whom he had contracted, to perform their contracts, or by his inability to procure transportation from Charleston to the place of delivery. But we concur with the Judge below in thinking that it was incumbent on the defendant to satisfy the jury that he had made a reasonable effort to procure performance on the part of the persons in Charleston with whom he had contracted, and to procure transportation. Whether he had made effort or not, was a

question of fact for the jury, and the jury found it against the defendant. It may be that the defendant did all
(269) that he was required to do. But we cannot revise the verdict.

We do not agree with the learned counsel for the defendant that this was a sale of goods "to arrive." In cases of the class of those he cited to us, the goods are supposed to have been previously shipped by a particular vessel, and their arrival at the place of delivery may fail, either by reason that they were not shipped as supposed, or that they were lost on the voyage. In such cases no duty in respect to their arrival can be imposed on the vendor who can do nothing to secure it, and the arrival is strictly a condition precedent. In the present case the defendant agrees to deliver the goods, with a proviso that the agreement shall be void in either of two events. The condition is a subsequent one, and it was incumbent on the defendant to show that one of the events which was to avoid the agreement had occurred. If he had introduced evidence that he had contracted with persons in Charleston for hides, and that upon demand they had failed, without fault on his part, to deliver them, that would have been a defense. It does not appear that the Judge was requested to charge to that effect. The charge which the Judge gave was in itself unexceptionable, and if he omitted to give any instructions which he might properly have given, it does not appear that he was requested to give them. It is well established that the omission of the Judge, under such circumstances, is not error.

PER CURIAM. Affirmed.

(270)

D. PENDER v. GRIFFIN BROTHERS & CO.

A judgment taken against A, B and C, no service of summons having been made upon A, is as to A erroneous.

CIVIL ACTION, tried before *Watts, J.*, at Spring Term, 1873, HALIFAX.

The facts necessary to an understanding of the case as decided in this Court are sufficiently set out in the opinion of the Court. From the judgment of the Court below against the defendants, they appealed to this Court.

Smith & Strong and *Clark & Mullen,* for appellants.
Haywood, Busbee & Busbee and *Bridgers, contra.*

RODMAN, J. On 30 September, 1872, the plaintiff issued a summons to the Sheriff of Halifax County against W. H. Griffin, Samuel H. Griffin and A. Capehart, partners under the name of Griffin Brothers & Co., alleging that said firm had made a note which had duly come to the plaintiff and demanding payment thereof, etc. This summons was returned, "Defendants not to be found in my county."

At Fall Term, 1872, the plaintiff filed his complaint, a copy of which and of the summons was forwarded by mail to the two Messrs. Griffin at New York.

On 30 September, 1872, the plaintiff applied to the Clerk of the Superior Court of Halifax for an attachment against certain property of the defendants upon an affidavit in which he stated:

1. That defendants were indebted to him, etc.

2. That the two defendants Griffin were non-residents of this State and resided in New York. Nothing is said of Capehart.

3. That defendants own an interest in a certain piece of land in Halifax conveyed by one Eppes to (271) W. H. Griffin.

Upon this the Clerk of Halifax Superior Court issued an attachment on 31 September, 1872, which on 2 October, 1872, the Sheriff levied on the right of Griffin & Brothers in the land mentioned.

On 30 September, 1872, the plaintiff, upon an affidavit of the non-residence of the defendants Griffin, procured an order for making them parties by publication, which was accordingly made.

On 12 November, 1872, a notice from the Sheriff of Halifax was served on Clark & Mullen and on W. H. N. Smith, described as attorneys for Griffin Brothers, to the effect that he had levied on a debt due by Eppes to Griffin Brothers & Co. for a certain sum, etc., collaterally secured by a deed in trust upon the land above mentioned, "which debt you have for collection in the case of W H. Brickell, guardian, H. D. Ponton and wife, and others, against Griffin Brothers & Co., now pending," etc., and requiring the said attorneys to furnish him with a certificate, etc.

At Spring Term, 1873, Griffin Brothers & Co., by their attorneys, answered the complaint. At least the record before us says they did. But the answer set forth is merely the answer of the above-named attorneys to the notice served on them. It does not appear that the Griffins ever appeared to the summons or answered the complaint. We consider the statement in the record to that effect as a clerical error, but in the view we take of the case it is not material. The answer of the attorneys need not now be set forth. Upon hearing it, however, the Judge discharged them, from which judgment the plaintiff appealed to this Court.

At the same term (Spring Term, 1873) the Judge apparently supposing that the defendants had appeared and answered the complaint, which so far as appears to us from the record before us, they never did, gave judgment against all the defendants, including Capehart, for the debt demanded in the summons and complaint. From this judgment
(272) the defendants appealed. It is the correctness of this judgment which we are now to consider.

1. The judgment is certainly erroneous as to Capehart, and must have been rendered by inadvertence. He was not personally served, and it is nowhere alleged that he was a non-resident.

2. As to the two Griffins, we think the service on them was regular and sufficient. C. C. P., sec. 83, subsec. 3, and sec. 84.

3. As to the effect of the attachment upon the real estate levied on, and upon the claim against Eppes in the hands of the attorneys of Griffin Brothers & Co., the facts are not sufficiently stated to enable us to arrive at any conclusion as to the rights of the parties. The same question more fully stated is presented in the case of *Ponton v. Griffin, post,* 362, in which the present plaintiff claims the fund arising from the debt of Eppes to Griffin Brothers & Co.

PER CURIAM. 1. Judgment against Capehart reversed, with costs to him against the plaintiff.

2. Judgment against the two Messrs. Griffin for the debt affirmed, with costs against them to the plaintiff.

3. The order discharging the attorneys is reversed, and the case may be remanded for further proceedings if desired.

Cited: Weaver v. Jones, 82 N. C., 442.

D. PENDER v. GRIFFIN BROTHERS & CO.

(See syllabus in the preceding case).

This was an appeal by the plaintiff from an order of the Court below, made in the preceding case, which order and the facts relating thereto are fully stated therein.

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(273)

H. & R. B. JOHNSON v. G. D. RAY and others.

What are the boundaries of a tract of land is a question of law. But if the Judge below leaves such question to the jury, and they find the law as his Honor ought to have held, no advantage can be taken of his Honor's charge.

EJECTMENT, tried before *Watts, J.,* at Fall Term, 1874, McDOWELL.

The action was brought to recover a tract of land in the county of Yancey, and removed upon the affidavit of the plaintiffs to the county of McDowell.

Both the plaintiffs and the defendants claimed the *locus in quo* under the deeds of conveyance from James and Robert Love, who were the owners of the land before the date of either conveyance. The deed to the plaintiffs, it was admitted, covered the *locus in quo,* but was of later date than the deed under which the defendants claimed, and which they insisted also covered the same tract or a portion thereof.

The execution and validity of the deeds of both plaintiffs and defendants were not denied, and the question arising on the trial was that of boundary.

The plaintiffs excepted to the charge of his Honor, which was substantially as follows:

The jury must first find the top of the Hurricane or Black Mountain Ridge, which is the ridge called for; and if the jury thought that the parties meant the ridge marked as "Black Mountain Ridge" was the "Hurricane or Black Mountain Ridge" in the deed, and if they believed that a due east course was not intended from the point B on the plot, they should run the line from said point to the nearest point of the said "Black Mountain Ridge," admitted to be at the point designated in the pleadings, D.

The following issues were submitted to the jury, and were all found in favor of the defendants:

1. Are the plaintiffs the owners in fee simple, as tenants in common of the land described in the complaint, and (274) are they entitled to the possession thereof?

2. Were the defendants, or either of them, wrongfully in possession of said land or any portion of the same, at the commencement of this action?

3. What amount of damages are the plaintiffs entitled to?

Upon this verdict there was judgment against the plaintiffs, who appealed, assigning as error the charge of his Honor.

Folk & Armfield, for appellants.
M. E. Carter, contra.

PEARSON, C. J. There is no error in the charge of which the plaintiffs have a right to complain.

The jury having found the fact that "C D" is "the ridge" called for, the question of boundary is too plain to admit of discussion.

What are the boundaries of a tract of land is a question of law, and his Honor ought to have instructed the jury that as the deed from A to B calls for a *due east* course, the fact that a corner is made at B, and another call is made, substituting the word "eastwardly" instead of "east," to-wit, then *along* the ridge (an eastwardly course) to the top of the ridge, a *due east* course was excluded unless a natural object called for could not be reached without following a due east course. This instruction would have been against the position taken for the plaintiffs, and the verdict, which finds the law as his Honor ought to have held, puts the matter right. His Honor might also have charged that the general description, "so as to exclude the headwaters of Borlin's Creek," made it necessary to follow the ridge. This the jury have done, and the plaintiffs have no right to complain of the omission.

PER CURIAM. Affirmed.

Cited: Jones v. Bunker, 83 N. C., 327.

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(275)

A. W. SHAFFER v. DAVID A. JENKINS, Public Treasurer.

The money in the Public Treasury is within the exclusive control of the General Assembly, and no court of this State has authority to compel the Public Treasurer to pay an admitted debt of the State against an express and positive prohibition of the General Assembly on the Treasurer to pay such debt.

ACTION for a *mandamus,* heard before *Tourgee, J.,* at January (Special) Term, 1874, of WAKE.

The petition was for a peremptory *mandamus,* to be directed to the defendant, as Treasurer, commanding him to pay the amount of certain warrants to the plaintiff.

His Honor gave judgment for the plaintiff, and thereupon the defendant appealed.

All the facts necessary to an understanding of the points raised and decided are stated in the opinion of the Court.

Attorney-General Hargrove and *Smith & Strong,* for appellant.

Fowle, contra.

RODMAN, J. By an act ratified 11 March, 1869 (Acts of 1868-'69, ch. 72), it was enacted that there should be laid out and established a turnpike road through the lands of the Educational Fund from the head of North River in Carteret County to the head of Adams' Creek in Craven County. That the Superintendent of Public Works should appoint a surveyor and commissioners to locate the road, and upon their report should let out the construction of the road and appoint a superintendent of the work. The act appropriated $5,000 for the construction of the road, to be paid by the Public Treasurer on the warrant of the Governor, and directed the Governor to issue his warrant for the payment of the contractors from time to time whenever the Superintendent of Public Works and the agent for construction should certify to him that any one or more sections had been completed
(276) and received. It does not appear that any work whatever was done upon the road, or that the Superintendent of Public Works and the agent for construction ever so certified to the Governor, though it may be assumed that they did. On 1 June, 1870, the Governor drew a warrant on the Public Treasurer in favor of Abraham Congleton for $710, purporting to be drawn under the act aforesaid. On 21 June, 1870, he drew a similar warrant in favor of W. A. Moore for $705, and on 6 July, 1870, another in favor of Congleton for $1,075. These warrants were countersigned in the name of the Auditor by his clerk, and were shortly after their dates presented to the Public Treasurer, who refused to pay them then on the ground that he had at that time no money in the Treasury applicable to the claims. He further said that he expected in some short time to have money which he might so apply, and he would then pay them.

Afterwards the warrants were assigned for value to the plaintiff by Congleton and Moore. The plaintiff several times applied to the Treasurer for payment, which was not made. On 13 December, 1871, the General Assembly by a resolution (Acts 1871-'72, p. 390) directed the Treasurer not to pay these or any similar warrants. After this he absolutely refused to do so, and this action was brought asking for a *mandamus* to compel him to pay them.

In determining this case we cannot give any weight to the promises to pay, which it is said were made by the Treasurer.

How far he may be bound as an individual by such promises is not pertinent to the question before us. The Treasurer is a public officer, who has no power over the moneys of the State except such as is given to him by some act of Assembly, and no promise of his binds the State. Admitting, for the sake of argument, that this Court would have jurisdiction to compel him to pay a debt of the State which he was required by law to pay, we think we have no right to require him to pay a claim which the General Assembly (as we must suppose, for a sufficient reason) has expressly directed him not to pay. This, of course, is admitted by the plaintiff to be true in general. In answer to it, however, it is said for (277) him:

1. That the claim of the plaintiff arises out of a contract with his assignors, which the State could not repudiate, and that the resolution of December, 1871, is therefore void and the Act of 1868-'69 still retains its full original force.

2. That the warrant of Governor Holden is conclusive proof that Congleton and Moore were contractors to construct the road, and that they did actually perform their contracts so as to entitle themselves to payment.

3. That the payment of the warrant was a mere ministerial duty on the Treasurer, which the proper Court should enforce.

It is proper to observe somewhat on each of these propositions.

As to the first and second, which may well be considered together. It is conceded that the provision in the Constitution of the United States that no State shall pass any law to impair the obligation of contracts, applies as well to a contract to which the State is a party as to one between individuals. But it must also be conceded, we think, that no court has jurisdiction to enforce the performance of an executory contract against a State.

But we do not understand that the General Assembly has undertaken to repudiate any contract which it may have made with Congleton and Moore for the construction of this road. It must be open to a State, as it is to an individual, to deny that any contract was made, and also to deny that the contract has been performed on the part of the other party so as to give him a rightful claim against the State. On the trial of this case in the Court below, the defendant offered evidence to

prove that in fact no part of the road had been constructed, and that consequently the warrant of the Governor must have been obtained by fraud and false representations. It is open to an individual, and it must be equally open to the State, to show that an acknowledgment of indebtedness has been procured by fraud and imposition on him, or on his agent, if the acknowledgment was made by an agent, and also to
(278) show a fraudulent combination between the claimant and the agent. His Honor, the Judge below, refused to receive any evidence of the fraudulent character of the claim, considering the warrant of the Governor as a conclusive acknowledgment of indebtedness on the part of the State. We concur with his Honor in considering the evidence immaterial in this particular action, not, however, for the reason which appears to have governed him, but for the reason (which will be presently discussed) that no court of this State has jurisdiction to take money out of the Treasury of the State, to pay even an admitted debt of the State, against an express and positive prohibition of the General Assembly on the Treasurer to pay such debt. In an action by the plaintiff against the State (which the Constitution allows) we conceive that this evidence would be pertinent and admissible.

Before leaving this part of the subject, it is proper to say that we have not noticed the fact that the warrant in question was countersigned by the Auditor, because we conceive that such counter-signature did not add to the force and effect of the warrant. For the same reason it is unnecessary to consider whether the Auditor is a judicial officer, and whether his powers can be exercised by deputy.

We come then to *the third proposition of the plaintiff*. In support of this he relies on the cases of *Cotton v. Ellis,* 52 N. C., 545, and *Bailey v. Caldwell,* 68 N. C., 472. In the first of these cases this Court did apparently order a *mandamus* to the Governor and Public Treasurer, commanding them to pay a claim against the State which the General Assembly had substantially declared illegal. In the case of *Mauran v. Smith, Governor,* 7 R. I., 192 (in 1865), in which the Court considered its power to issue a *mandamus* to the Governor to perform a statutory duty, it says: "In North Carolina, *Cotton v. Ellis,* the Court decided in favor of the jurisdiction, and, for anything that appears, issued the writ,

being the only instance which we find reported in which the writ may have issued against a Governor, (279) except where he consented to the jurisdiction for the sake of getting the opinion of the Court upon the merits of the relation."

The learned Court perhaps overlooked the concluding part of the opinion in *Cotton v. Ellis,* from which it appears that the Governor did in that case consent to the jurisdiction in order to obtain the opinion of the Court on the merits of the relation. Such we know was the case also in *Bailey v. Caldwell.* These cases, therefore, are not authorities in favor of the jurisdiction of a court to issue a *mandamus in invitum* against a Governor. And whenever that question shall be presented, the learned opinion of the Supreme Court of Rhode Island adverse to such a jurisdiction will deserve respectful attention. These observations on these cases are made only to show that they are not authorities bearing on the question before us.

Assuming that a court of the State has jurisdiction to enforce by the writ of *mandamus* the performance by the Public Treasurer of a ministerial duty imposed on him by statute, yet these cases are not authorities that such Court may enforce a payment of money forbidden by a statute, upon the ground that the statute forbidding payment is unconstitutional.

Cases may perhaps be found to the effect that a court may exercise such a jurisdiction. And we will not undertake to say that there may not be cases in which it may properly do so. But this is not one of those cases. The resolution of December, 1871, did not impair the obligation of any contract. It denied the indebtedness of the State under the contract, if there was one, and left that question to the Court having jurisdiction of such questions under the Constitution in which the merits of the claim may be inquired into. We cannot doubt that if the plaintiff shall establish the justice of his debt before the constitutional tribunal, the General Assembly will accept the decision and provide for its payment.

However this may be, the money in the Treasury is within the exclusive control of the General Assembly. No court can undertake to administer it. To do so would produce confusion, and the result might be to have the State without

(280) the means of paying the officers of the government, which would thus fall to pieces.

There are cases, no doubt, in which a court has undertaken to enforce the obligations of a State, and has more or less directly put its hand upon the money in the State Treasury. *Woodruff v. Trapnall,* 10 How., 190.

But we conceive that those cases go no further than this: If the Legislature, by way of contract, has specifically appropriated a certain fund to a certain debt or to a certain individual or class of individuals, and the State Treasurer, having that fund in his hands, refuses to apply it according to the law, he may be compelled to do so by judicial process.

If any case goes further than this, we conceive that it cannot be supported on principle, and that it oversteps the just line of demarcation between the legislative and judicial powers.

PER CURIAM. Judgment below reversed, and judgment that defendant go without day.

Cited: Wilson v. Jenkins, ante, 6.

(281)

GEORGE F. BASON, admr., and others v. PETER R. HARDEN and others.

A father made advancements to four of his children to the value of $1,200 each; to four others he advanced nothing. Those to whom he had made advancements were also his sureties, and he was otherwise indebted to them. To pay his debts and save his sureties from loss, he conveyed all his property in trust; the sureties, his creditor children, at the same time covenanting with the others, that in case the property was insufficient to pay the debts of the father, and also to make those who had received nothing, equal to themselves, that they would apportion the advancements they had received so as to make all the children of their father equal: *It was held*, that the proper construction of this covenant was, that if the father on the close of the trust should owe the creditor children more than the amount of their respective advancements, they should pay back nothing; but if he owed them less than their advancements, the difference (being the true debt due to the father) was to be so apportioned as to make all equal.

(*Hinton v. Whitehurst*, 68 N. C., 316, cited and approved).

CIVIL ACTION, tried before *Kerr, J.*, at Fall Term, 1874, ALAMANCE.

On 22 June, 1860, the defendants executed the following bond to-wit:

Know all men by these presents, that we, Daniel C. Harden, Peter R. Harden, John W. Harden and William Mebane, do each, severally and separately, acknowledge ourselves indebted to John Harden in the just and full sum of one thousand dollars, to the payment whereof we do each bind ourselves, our respective heirs, executors and administrators, severally, by these presents. Sealed with our seals and dated this 22 June, 1860.

The condition of the above obligation is such that whereas the said John hath heretofore at divers times and in divers ways advanced certain of his children, to-wit, the said Daniel C., Peter R. and John W., his sons, to the amount of twelve hundred dollars each in the way of real estate conveyed to them, and his daughter Peggy, the wife of (282) the said William Mebane, to the amount of eight hundred dollars in the way of a negro girl; and whereas the said John hath other children, to-wit, George M. Harden, Bettie, wife of William Dewey; Adeline, wife of John Dewey, and Maria, wife of Robert A. Noell, to whom he has given noth-

ing, and he is now doubtful whether he will be able to advance the said other children at all, or if at all to an amount of twelve hundred dollars each; and whereas the said John hath become largely indebted and the above-named obligors are his sureties for large sums of money, and he being desirous to save them harmless from any and all loss by reason of their liabilities on his account, hath agreed and doth hereby agree to and with the said obligors to execute a deed in trust conveying all his estate, both real and personal, upon trust and with the intent to secure the payment of all his just debts, and more particularly of all such debts as they, the said obligors, may be bound for as his sureties, and they on their part being desirous that full and perfect equality shall prevail amongst all the children of the said John, and not desiring any advantage for themselves, have agreed with and do hereby agree with and promise to the said John for and in consideration of the premises, and for and in consideration of his so executing the said deed in trust for the purposes aforesaid, and in case it shall so happen that the whole of the estate and effects of him the said John shall be consumed in the payment of his debts, or so much thereof as that he shall be unable to advance his said other four children, above named respectively, to the sum of twelve hundred dollars, that they, the said obligors, will contribute and pay, each and *pro rata*, the said children as unadvanced as aforesaid, such sum or sums as will make their share or shares equal to the share or shares of them, the said obligors, and the sum of twelve hundred dollars shall be taken as the standard by which the value of each shall be estimated; but provided, always, that the amount or amounts to be credited by the said William Mebane shall in no case ex-
(283) ceed the sum of three hundred and thirty dollars; and provided, also, that in case the property hitherto given as aforesaid to the said obligors, or either of them, shall be lost to them for or on account of its liability to the debts of the said John, then the amount or amounts of their contributions shall abate accordingly.

Now, if the said Daniel C., Peter R., John W. and William Mebane shall well and truly perform their said agreement and promise, and shall well and truly, whenever called upon by the said John, after the sale under the said trust deed, and it shall be seen that he, the said John, is unable to

do equal justice amongst all his children herein named, contribute and pay *pro rata,* as is above set out, such sum or sums subject to the foregoing conditions as will make the share or shares of any and all equal, then this obligation to be void; otherwise, to remain in full force and effect.

The action was brought to compel a compliance with this bond. All the other facts necessary to an understanding of the case are fully set out in the opinion of the Court.

Boyd, for appellants.
Scott, Dillard & Gilmer, Graham & Graham, and *Morehead, Jr., contra.*

BYNUM, J. John Harden had eight children, to four of whom, who are the defendants, he had made considerable advancements, and to the other four, who are plaintiffs, he had advanced nothing. The defendant children were also his sureties for large amounts, and he was otherwise indebted to them. The father, becoming embarrassed in his circumstances, and at the same time being desirous that all his children should have an equal share of his bounty, executed a deed conveying all his property to J. W. Harden in trust to sell, pay his debts and save harmless his sureties. The defendants, in consideration thereof, executed the bond declared on in this action, whereby they severally covenant, in case the trust property was insufficient to pay the debts of the father, and also to make the other children equal to (284) those already advanced, to apportion the advancements they had received, so as to make all the children equal.

Upon the coming in of the answers, by consent it was referred to Cyrus P. Mendenhall to ascertain and state the facts and his conclusions of law thereupon. The report of the referee in the case of *Bason v. Harden, post,* 287, so far as applicable, by the agreement of counsel is to be taken as the report in the case. It appears therefrom that all the trust property has been sold and applied in the payment of debts, leaving a considerable amount unpaid, and that John Harden died insolvent, without having made any advancements to the plaintiffs, his children, and still largely indebted to some of the defendants. It is also found that the estate of John Har-

den is still indebted to D. C. Harden, one of the defendants, in a sum much larger than the advancement received; that Mebane, another defendant, received his advancement in a negro girl valued at $800, and that she was an expense to him until he lost her by emancipation; that the estate of the intestate is yet indebted to the remaining two defendants, J. W. Harden and P. R. Harden, more than $600 each; and lastly that each of the male plaintiffs is indebted to each of the defendants, but the precise amount is not stated, as the referee, from his view of the law, did not regard the latter indebtedness as material. From these facts the referee found, as a conclusion of law, that neither of the defendants was liable to the plaintiffs or either of them in this action.

Exceptions to the report were filed by the plaintiffs, which were sustained by the Court, and judgment was rendered against the defendants, from which they appealed to this Court. The exceptions raise questions of law only, and will be now considered.

1. The plaintiffs insist that the true construction of the bond is that the defendants are not discharged from liability thereon, unless the trustor is now indebted to them in a sum equal to the advancements respectively received by (285) them, and that the referee erred in holding them discharged if the indebtedness was half the sum advanced. This was error in the referee. To us it clearly appears from the bond that the purpose of both parties was that all the children should share equally the bounty of the father. If after discharging all his debts, under the deed in trust, enough remained to make all equal, the advancements already made were not to be disturbed; but if the estate fell short of that, then the advancements already made were to be equally apportioned among all. But as the father was largely in debt to the children whom he had advanced, if the trust property failed to discharge these debts it would be manifestly unjust and inequitable for these children, after losing by their father an amount equal to or greater than their advancements, to have to divide their advancements with the other children. Hence the bond, in effect, provides that if the father, on the close of the trust, should owe these creditor children more than the amount of their advancements respectively, they should pay back nothing; but if he owed them less than their

advancements, the difference, being the true debt due to the father, was to be so apportioned as to make them all equal.

Applying this construction of the bond to the facts as found, and it appears that the estate of the father owes D. C. Harden, one of the defendants, over $1,200, the value of his advancement, he is therefore discharged from liability. W. M. Mebane, another defendant, received by way of advancement a negro girl valued at $800. This negro and her children were an expense up to their emancipation by the power of the government, and according to the principle established in the case of *Hinton v. Whitehurst,* 68 N. C., 316, Mebane is not liable to contribution to the plaintiffs. The remaining two defendants who have been advanced are J. W. and P. R. Harden, and as to them the referee finds that the trustor was indebted to each in a sum greater than $600, but how much greater is not stated, and in this consists one defect and error in the report. Each one of these two defendants received an advancement valued at $1,200, and to that (286) extent each one is the debtor to the father. If the father is indebted to them, say to the amount of $800 each, the difference, $400, would be the true value of the advancement to be apportioned. That sum would be divided into eight parts, and each of the eight children would be entitled to fifty dollars to produce the exact equality contemplated by the bond. But outside of the father's estate, the referee finds that each one of the male plaintiffs is indebted to each one of the defendants, but the precise sum is not ascertained by the referee. If it should turn out that the advancements of J. W. and P. R. Harden exceed the liability of the father to them, in apportioning the excess among the plaintiffs these two defendants would be entitled to set off the indebtedness of the plaintiffs to them respectively.

The report indicates that the plaintiffs are indebted to the two defendants, J. W. and P. R. Harden, upon a balance of accounts, but as the facts are not found so that the Court can so declare, the case will be remanded, to the end that the plaintiffs, if they desire it, may have a re-reference to complete the account according to the principles herein announced as between them and these two defendants.

The judgment of the Superior Court is reversed, and judgment is here rendered in favor of the defendants, D. C. Har-

den and W. M. Mebane, and the cause is remanded as to the other parties, that the parties may proceed as they may be advised.

PER CURIAM. Judgment reversed; case remanded.

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(287)

GEORGE B. BASON, admr. of JOHN HARDEN, JAMES A. TURRENTINE, exr., etc., and others v. JOHN W. HARDEN, trustee of JOHN HARDEN, deceased.

1. Where A, in 1863, conveyed his property to B *in trust* to pay certain enumerated debts, divided in the deed into three classes, and C, one of the second-class creditors, directed the trustee, B, to withhold from collection an amount sufficient to pay his debt, which was done, and the note so withheld by the trustee became worthless by the results of the war, and not through any default of the trustee: *Held*, that C was not entitled to a *pro rata* share of the money collected for the benefit of the second-class creditors, and that the trustee was not liable therefor.

2. A trustee who diligently inquires after the holder of a certain note secured to be paid in the second class of a trust made in 1863, and who being unable to find the same, still reserves a sufficient amount of the trust funds, to-wit, a note solvent at the time, to pay said secured note, is not guilty of laches because of said trust-fund note becoming worthless from the result of the war; and being in no default, cannot be charged with its *pro rata* payment as a second-class debt.

3. A Judge below, in stating a case for this Court, which has been the subject of a reference, should not find facts and make conclusions of law not raised by the referee's report.

ACTION for an account and settlement of a trust fund, heard upon exception to the report of a referee, before *Kerr, J.*, at Fall Term, 1874, of ALAMANCE.

The cause coming on to be heard in the Court below, upon the report of C. P. Mendenhall, Esq., the referee, and the exceptions thereto, his Honor sustained certain exceptions to said report and gave judgment against the defendant.

From this judgment the defendant appealed.

The material facts, as found by the referee and the presiding Judge, pertinent to the questions raised and decided in this Court, are fully set out in the opinion of *Justice Bynum*.

Dillard & Gilmer, Morehead, Jr., and *Boyd,* for (288) appellant.

Graham & Graham and *Scott, contra.*

BYNUM, J. This is a creditor's action against the trustee of a fund for an account and settlement thereof. Upon the coming in of the answer, it was referred to Mr. Mendenhall as the commissioner to take the account and report the facts and his conclusions of law thereupon. The account was taken and the report made, from which it appears that on 22 June, 1860, John Harden, by deed, conveyed all his property of every description to his son, J. W. Harden, in trust to reduce it to cash and pay his debts, which were therein enumerated and divided into three classes, and were to be paid in that order. The commissioner finds that all the property was disposed of, and that the trustee collected $14,129.22 as the proceeds thereof; that, including his commissions and expenses, he paid out in discharge of debts secured in the trust the sum of $14,819.93, being $690.71 in excess of his receipts. He also finds that the trustee failed to collect $1,639.12 on sales made by him, but he is allowed credit therefor, because the debts were lost without his default. As no exception is taken to this finding, no further notice will be taken of that sum. It is further found from the evidence set forth that the trustee acted in good faith and with ordinary prudence and diligence in the management of the trust, and, as a conclusion of law from all the facts found, that the plaintiffs are not entitled to recover anything in this action. The only exceptions to the report insisted on here are filed by D. C. Harden and J. A. Turrentine, and were allowed by his Honor below, who thereupon reversed the judgment of the commissioner and rendered judgment for the plaintiffs, from which the defendant appealed to this Court.

1. First, as to D. C. Harden. His exceptions may be resolved into a single one, to-wit, that the commissioner finds as fact that he, Harden, refused to take Confederate money on his debt, and was therefore excluded from a *pro rata* share of the funds appropriated by the trust to the payment of creditors of the second class. His Honor found that (289) he did not refuse to receive Confederate money, was not excluded from that class, and, as a conclusion of law, that

he was entitled to judgment. We are concluded by this finding of the facts by his Honor, and have only to review his legal deduction therefrom. Both the commissioner and his Honor base their findings upon the same piece of evidence, to-wit, a letter from D. C. Harden to the trustee, dated 14 June, 1863, the material part of which is as follows: "I would advise you to be careful what kind of money you receive, especially if you want me to take any of it, as I am not willing and will not take any depreciated currency on my debts, as I have now more than I can use to advantage, and I had rather do without mine two or three years longer than to take it; though you can receive any kind that you can pay debts with in their proper turn." Admitting that his Honor was correct in finding that this was not a refusal to take Confederate money, upon the narrow and technical ground that no tender was actually made, yet such emphatic language must have the effect of a license and direction to the trustee that he might collect and pay out that currency to all the creditors who would take it, provided the trustee would withhold from collection so much of the notes in his hands as would cover his debt. This is precisely what the trustee did, as the commissioner has found. If, therefore, these notes, so held back at the instance of Harden, and for his benefit, afterwards became worthless by the results of the war, as is likewise found, upon no principle of equity can he be held liable. The fund set apart for the payment of this debt, at the suggestion of the creditor, was lost, and he only is to blame for not sharing the then currency of the country with the other creditors of the same class. So that although the commissioner erred in his finding a refusal, yet he was correct in the legal conclusion that D. C. Harden was not entitled to recover. His Honor is overruled in sustaining this exception, and the report
(290) of the commissioner therein is confirmed.

2. Exceptions of Turrentine: That the commissioner found as a fact that the Gerringer note, by the omission of the holder to present it within three months from the execution of the trust, was postponed to the third class of creditors, and as a conclusion of law that the holder was not entitled to a *pro rata* share of the funds appropriated to creditors of the second class. His Honor sustained this exception and rendered judgment in favor of this plaintiff, finding, first,

that the note belonged to the second class of debts, and that it was laches in the trustee not to find it or make more diligent search for it. The commissioner here again erred in his facts, but was correct in his conclusions. The Gerringer note did belong to the second class of debts, and would have been entitled to payment *pro rata* with the others of that class but for other facts found by the commissioner, which excused the trustee from paying it while he had funds applicable to that debt. His father, the trustor, had informed him that one Jacob Somers held the note, and helped him to search through all his papers for it, but without finding it. Being told by Somers that it was in the Gerringer family (Margaret, the original owner, being dead), he went to Mr. Gerringer's where he was directed, and made inquiry, but could get no information about it, and it was not until December, 1869, that the holder, John S. Turrentine, presented it and demanded payment. But the trustee did not rest at that, but retained notes then solvent sufficient to pay this debt with others. Take this evidence, in connection with the finding that he acted in good faith and ordinary prudence; that the trust was executed in the midst of the most stirring period of the war; that he was hampered by stay laws, and everything around him was crumbling to pieces under the shock of arms, which finally, and before he could close his stewardship, thrust him in the army, where he had to remain until the war closed, and what remained of the trust estate was lost thereby—put all this together, and his Honor was certainly in error in sustaining this exception by holding the defendant to (291) have been guilty of laches and in rendering judgment against him on the Gerringer debt. This exception is overruled and the report of the referee is confirmed.

Here our labor would regularly end but for the fact that his Honor, in stating the case for this Court, which was done several months after the trial and judgment, has found facts and made conclusions of law not raised by the exceptions. This practice is well calculated to take parties by surprise and produce confusion and uncertainty in the trial of causes. Regularly, the referee finds the facts and his conclusions of law thereon, stating each separately. Either party is entitled to a review of the facts and the law by exceptions filed in the par-

ticulars wherein he feels aggrieved. It is equally the duty of the Judge, in reviewing the exceptions, to find and state the facts separately, with his conclusions of law thereon. The appeal to this Court is from his judgment then and there rendered. No new facts can be afterwards found, or new points, in the nature of other exceptions, be raised. The parties must stand or fall according to the case as tried.

In the case stated, his Honor has found as a fact that the trustee collected $1,867.80 in United States currency since the war, which he has not expended in the payment of the debts of the trustor, according to the deed. A question is thus raised after the trial and appeal which had not been raised by exception or otherwise. The referee does not find as a fact that any part of the fund was United States currency, or make any distinction in his account, and no exception is taken to the report in that account. By examining the account, however, we find that a considerable amount of what doubtless was "good money" has been paid out on debts, and that the residue is absorbed in the commissions of the trustee. As he has paid out $690 more than he received, the additional value of his commissions in this currency will not more than compensate for this loss.

(292) PER CURIAM. Judgment below reversed, and action dismissed.

Cited: Bason v. Harden, ante, 284.

J. C. ABBOTT and F. W. FOSTER v. A. K. CROMARTIE.

1. A defendant entitled to a homestead in certain lands which have been sold under an execution against him, is not estopped from claiming his homestead by accepting a lease for the same land from the purchaser at execution sale.

2. This right to a homestead is no defense, however, by the tenant to an action to recover the premises brought by the landlord. The tenant must wait until his term expires before asserting his claim to the homestead.

(*Wade v. Saunders*, 70 N. C., 277; *Calloway v. Hamby*, 65 N. C., 631; *Turner v. Lowe*, 66 N. C., 413; cited, distinguished from this, and approved).

EJECTMENT, tried before *Russell, J.*, at Spring Term, 1874, BLADEN.

On 24 October, 1868, judgment was rendered against the defendant in favor of Smith & Straus, and execution issued thereon to the Sheriff of Bladen County.

In pursuance of this execution the land in controversy was sold, one Patrick L. Cromartie becoming the purchaser.

The defendant took from said Cromartie a lease of said land for three years.

While the lease was subsisting, P. L. Cromartie sold the land to one J. E. Eldridge, who conveyed it to the plaintiffs. The lease having expired, this action was brought to recover the land.

The defendant claimed the land as his homestead. After the sale of the land by the Sheriff, and after the expiration of the lease, he had his homestead laid off and (293) set apart.

The only issue submitted to the jury was "whether the defendant waived his right to the homestead in the land at the time of the levy and sale." The jury found the issue in the affirmative.

His Honor being of the opinion that the plaintiffs were not entitled to recover, gave judgment in favor of the defendant, whereupon the plaintiffs appealed.

R. H. & C. C. Lyon and *W. McL. McKay*, for appellants.
W. S. & D. J. Devane and *Smith & Strong, contra.*

BYNUM, J. The plaintiffs do not deny that at the time of the execution sale the defendant was entitled to a homestead in the land sold. It is an estate confirmed by the Constitution, Art. X, sec. 2, and is not subject of levy and sale under execution. The Sheriff's deed, therefore, could pass to the purchaser only what he had the right to sell, *i. e.*, the land, subject to the homestead estate. This much is clear. But it is alleged, and not denied, that the defendant in the execution, who is also the defendant in this action, after the sale accepted from the purchaser a lease for three years, and continued in possession under that lease until it expired. That he then continued in possession of part of the premises which he had had assigned to himself as a homestead after the execution sale and the lease.

This acceptance of a lease from the purchaser, it is contended, established the relation of a landlord and tenant between the plaintiffs and defendant, and that the defendant is estopped from setting up a title to the land adverse to that of the plaintiffs. To this the defendant answers, that if the execution sale and deed did not have the effect of passing the title to the homestead, the acceptance of a lease afterwards could not have had that effect, for that an estate or interest in lands cannot be passed without a deed or writing, so that the title of the defendant was the same after as before the
(294) lease, the only effect of which was to estop him from denying the title of the purchaser during the continuance of the lease. The plaintiffs reply to this, that the principles of estoppel extend farther and do not permit the defendant to set up the title until he has surrendered the possession and put the landlord in the same plight and condition he occupied prior to the lease, and that even then he could not assert title, because he had in this case waived his right of homestead, and so lost it absolutely. The defendant answers the plaintiffs by denying:

1. That his act constituted a waiver of his homestead; and
2. That the law will compel him to surrender his possession when he has the title and his lease has expired.

We hold with the defendant that the acceptance of a lease, the only act alleged as constituting a waiver of the homestead, does not have that effect. The defendant owned the legal estate in the land, and the Constitution confers no new

estate upon him, but only confirms an existing one, to the extent therein expressed, and restricts his powers of alienation and to charge it with his debts. Having, then, the estate in the land exempt from execution, he can part with it only by the formalities prescribed by law. It is true we have the legal maxim, *quilibet potest renunciare juri pro se introducto,* under which a party may renounce valuable rights and advantages; but it can have no application where an express statute enjoins a compliance with the forms it prescribes. For instance, a testator cannot dispense with the formalities which are essential to the validity of a testamentary instrument as prescribed by statute; so a grantor cannot dispense with the forms of conveyance of an estate or interest in lands prescribed by the statute of frauds. The defendant, then, has not parted with his homestead by accepting a lease. But on the other hand, we hold with the plaintiff that the defendant has shown no defense to this action. No proof of title is required when the action is brought by a landlord, since if a tenant has once recognized the title of the plaintiff, and treated him as his landlord by accepting a lease from him, he is precluded from showing that the plaintiff had no title at (295) the time the lease was granted; for it is a general rule founded on reasons of public policy that a tenant shall never be permitted to controvert his landlord's title, or to set up against him, during the tenancy, one which is hostile in its character to that which he acknowledged in accepting the demise. The possession of the tenant is the possession of the landlord, and so long as the possession subsists, so long does the relation of the landlord and tenant exist. To that extent all the authorities. Taylor Landlord and Tenant, 515, and notes. It follows that this relation and the rights growing out of it can be destroyed only by surrendering the possession to the landlord as it existed prior to the lease. When that is done, and not before, the defendant is at arm's length and can assert his title by action or otherwise. *Wade v. Saunders,* 70 N. C., 277.

In *Calloway v. Hamby,* 65 N. C., 631, and in *Turner v. Lowe,* 66 N. C., 413, it is held that the tenant, though he cannot dispute his landlord's title, is not precluded from showing an equitable title in himself, or any matter making it

inequitable to deprive him of the possession; but these cases are put upon the ground that the relation of the landlord towards the tenant was that of trustee, and these cases have no application here.

PER CURIAM. Judgment accordingly.

Cited: Edwards v. Kearsey, 74 N. C., 243; *Lambert v. Kinnery, Id.,* 350; *Beavan v. Speed, Id.,* 548; *Heyer v. Beatty,* 76 N. C., 31; *Davis v. Davis,* 83 N. C., 73; *Pope v. Matthis, Id.,* 175; *Hughes v. Mason,* 84 N. C., 475; *Springs v. Schenck,* 99 N. C., 555; *Hughes v. Hodges,* 102 N. C., 259.

(296)

JOSEPH W. JENKINS & CO. v. WILLIAM H. SMITH and CHAS. S. SMITH.

In a mutual running account between a commission merchant and his customer, where neither party makes any specific application of certain cotton shipped by the customer in payment of advances made by the merchant: *Held*, that the cotton so shipped was to be applied in payment of the items of the merchant's account as they were respectively made; *e. g.*, the first item on the debit side is discharged or reduced by the first item on the credit side.

(*Jenkins v. Beal*, 70 N. C., 440, cited and distinguished from this; *Boyden v. Bank*, 65 N. C., 13, cited and approved).

CIVIL ACTION, tried before *Henry, J.*, at December (Special) Term, 1874, HALIFAX.

This case was referred to David A. Barnes, who filed the following report, to-wit:

On 18 June, 1872, the defendants covenanted under their hands and seals, in manner and form as follows:

Know all men by these presents, that we, Charles S. Smith and William H. Smith of Halifax County, State of North Carolina, are held and firmly bound unto Joseph W. Jenkins and Robert H. Pender, partners under the name and firm of Joseph W. Jenkins & Co., residing and doing business in the city of Baltimore, State of Maryland, in the sum of ten thousand dollars, to the payment of which sum, well and truly to be made, we bind ourselves, our, and each of our heirs,

executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 18 June, 1872.

The condition of the above obligation is, that whereas the said J. W. Jenkins & Co. have advanced and loaned to the above-bounden Charles S. Smith the sum of one thousand dollars, and have agreed to advance and loan to the said Charles S. Smith, between the day of the date hereof and the first day of August next, the further sum of two thousand dollars ($2,000.00), and such additional sum between this day and the first day of October next as the said Joseph (297) W. Jenkins & Co. may, in their discretion, see fit, and in consideration thereof the said Charles S. Smith has agreed and does hereby agree to ship between this day and the first day of January, A. D. 1873, a sufficient quantity of cotton to the said Joseph W. Jenkins & Co. to cover, and sell for, and of the value of double the amount of the advancements which the said Joseph W. Jenkins & Co. have already made and may hereafter make, within the latest day specified, to the said Charles S. Smith, from the proceeds of which cotton the said Joseph W. Jenkins & Co. are to retain for their own use their usual commission on sales of cotton, and other legitimate charges, and the amount with interest which they have advanced and may hereafter advance to the said Charles S. Smith, and the remainder they are to pay over to the said Charles.

Now, therefore, in case the said Charles S. Smith shall comply in all respects with his said agreement, or, failing therein, shall pay to the said Joseph W. Jenkins & Co. all such sum or sums as they may advance to him, with interest, and moreover the usual commission on the amount and quality of cotton herein stipulated to be shipped to the said Jenkins & Co. by the said Charles S. Smith, and this on or before 1 January, 1873, then this obligation shall be void; otherwise, shall remain in full force.

C. S. SMITH, [SEAL.]
W. H. SMITH. [SEAL.]

Executed, being first duly stamped in presence of
ED. CONIGLAND.

At the time of the making of said writing obligatory the plaintiffs were commission merchants in the city of Baltimore, and had then advanced to the defendant Charles S. Smith the sum of one thousand dollars. Thereafter, and before the first day of October, 1872, they advanced to him six thousand five hundred and thirty dollars and fourteen cents.

Between the first day of October, 1872, and the first
(298) day of January, 1873, they advanced to him eleven thousand and twenty-five dollars and twenty-five cents, the aggregate amount advanced being eighteen thousand five hundred and fifty-six dollars and nine cents.

Between 1 October, 1872, and 1 January, 1873, the defendant Charles S. Smith shipped to the plaintiffs one hundred and sixty-two bales of cotton, which, after deducting expenses, including commissions of two and a half per cent., brought the net sum of eleven thousand nine hundred and ninety-seven dollars and forty-seven cents, being a difference between advancements and sales of cotton of six thousand five hundred and fifty-eight dollars and sixty-seven cents.

The plaintiffs kept a general account against the defendant Charles S. Smith, charging him with advances when made and crediting him with sales of cotton when made, but before the commencement of this action made no specific appropriation of the proceeds of the cotton to any particular item of the account, nor were they so instructed by the defendant.

The plaintiffs advanced money and accepted drafts for defendant Charles in large sums after 1 October, 1872, upon the express promise of said defendant to ship cotton to meet said advances, the plaintiffs refusing to make such advancements unless the cotton was shipped to reimburse them.

In December, 1872, the defendant Charles made an agreement, to-wit, to ship to them forty bales of cotton, the proceeds to be applied to certain acceptances which plaintiffs agreed to make upon condition of such shipments.

Plaintiffs furnished defendant Charles on 31 December, 1872, an itemized account, containing all the items of charge made between the date of the contract and the date of the rendition of the account, and giving credit for the one hundred and sixty-two bales of cotton, showing a balance then due the plaintiffs of twelve thousand four hundred and one

dollars and eighty-three cents, and the defendants insisted that this was a specific appropriation to the items of the account first made, and in exoneration of the lia- (299) bility of the defendants upon their written agreement.

The plaintiffs claimed to charge the defendants with the sum of eleven hundred and eighty-three dollars and fifty cents, the amount of a note given by defendant Charles S. Smith to one Overby. The facts were that Overby, prior to the making of the writing obligatory of the defendants, was indebted to the plaintiffs and transferred to them the note of Charles S. Smith in payment of said indebtedness. Charles S. Smith afterward drew a draft on the plaintiffs for the amount of the said Overby note, and it was charged to him as an advancement.

The plaintiffs claimed the right to charge the defendants with the sum of $410.55, commissions on cotton not shipped according to agreement.

Upon the foregoing facts it is considered and adjudged by me as a matter of law that the plaintiffs are not entitled to charge the defendants with the Overby note as an advancement, neither are they entitled to charge them $410.55 on cotton not shipped, as they have charged them with commissions of about this amount on advances.

It is further considered and adjudged that the defendants are not entitled to have the proceeds of the cotton applied first in exoneration of their liability on the said obligation, and it is further adjudged that the plaintiffs are entitled to recover from the defendant W. H. Smith the sum of $6,558.67, and interest from 23 January, 1873, and the cost of this action.

To which report the defendant W. H. Smith filed the following exceptions, to-wit:

I. That the referee finds as a fact that the plaintiffs advanced to the defendant Charles S. Smith $6,530.14 before 1 October, 1872.

II. That said referee finds as a fact that thereafter, and before 1 October, 1872, they, meaning the plaintiffs, advanced to him, the defendant Charles S. Smith, (300) $6,530.14, whereas the sum of $1,321.11, part of the said sum of $6,530.14, was not in fact paid by the plaintiff until 25 October, 1872, and whereas the sum of

$670.47, a further part of said sum, was likewise not paid by the plaintiffs until the said 25 October, 1872.

III. That in estimating the advances made by the plaintiffs for which W. H. Smith is liable the referee adopted the account of plaintiffs, wherein it appears that on 1 August, 1872, the plaintiffs had advanced to Charles S. Smith the sum of $4,662.10, whereas William H. Smith has contracted in the bond to be liable only for the sum of $3,000, to be advanced before that date.

V. That said referee finds as a fact that plaintiffs made no specific appropriation of the cotton to any particular items of the account, whereas the plaintiffs, by sending to the defendant on 31 December, 1872, an itemized account containing all the items of charge made between the date of the contract and the date of the rendition of the account, and giving credit for one hundred and sixty-two bales of cotton, showing a balance then due the plaintiffs of $12,001.83, did in fact and in law make specific appropriations of the proceeds of the cotton to those items of account which were first charged in said account.

VI. That said referee did not rule as a matter of law arising upon the facts that the bond mentioned in the said report is discharged as to the defendant W. H. Smith by the shipment to the plaintiffs by the defendant Charles S. Smith, within the time specified, one hundred and sixty-two bales of cotton.

It appeared from a written account filed by the plaintiffs as a part of their complaint that the sum of advances claimed to have been made by them to Charles S. Smith, under the contract contained in this bond, amounted on 1 August, 1872, to $4,662.10.

It also appeared from said account that plaintiffs charged as advances made to C. S. Smith before 1 October, 1872,

two drafts, one for $1,321.11 and one for $670.47,

(301) accepted by them for C. S. Smith before 1 October, but not paid until 25 October, 1872.

The bankruptcy of C. S. Smith having been suggested, the action was prosecuted against W. H. Smith alone.

His Honor overruled the exceptions of the defendants and gave judgment for the plaintiffs, whereupon the defendants appealed.

Moore & Gatling and *Hill,* for appellants.

Conigland, with whom were *Bridges & Son* and (303) *Batchelor,* for the plaintiffs.

PEARSON, C. J. It appears on the face of the bond (306) that W. H. Smith was a surety, and we declare that to be a fact. From the view we take of the case, that fact does not very materially affect the merits of the case.

The principal, C. S. Smith, when he forwarded cotton to the plaintiffs did not make any specific application. The plaintiffs, on the receipt of the cotton, made no specific application; on the contrary, they entered the receipts of cotton from time to time as items in a running account against C. S. Smith, in which he was debited by the amounts advanced and credited with the proceeds of the cotton received, and closed up the matter by an *account stated,* setting out the items of debit and credit. In *Jenkins v. Beal,* 70 N. C., 440, it is held that when one holds two *distinct debts,* one secured by mortgage and the other without security, and the debtor makes a payment, but does not apply it to the one debt or the other, the creditor has a right to apply it as a credit on the unsecured debt, and if he does not make the application specifically, the law will make the presumption that he applied it to the "most precarious debt," as it is termed, that is, to the unsecured debt. That case does not apply, for here there are not distinct debts and a distinct payment, but a running account in which the money advanced is charged as items of debit, and the proceeds of the cotton are entered as items of credit without any reference to the fact that the plaintiffs held the bond sued on as a collateral security for the first items of debit.

Had the plaintiffs made a specific application of the cotton received to the items of debit outside of the items secured by the bond, it would have raised the question whether he would be allowed, in equity, to do so, to the prejudice of a surety who was bound to see that a certain amount of cotton was delivered by his principal, and had a right to (307) expect that whatever cotton was delivered should be allowed as a credit in discharge of his bond. This question, however, does not arise, for the plaintiffs made no specific application of the cotton, but entered the several lots

of cotton received as items in a running account, embracing the whole as one transaction, served up in an account stated and rendered.

In *Boyden v. Bank,* 65 N. C., 13, it is taken to be settled: "In adjusting a running account between a bank and its customer the rule is, the first money paid in is the first money paid out; the first item on the debit side is discharged or reduced by the first item on the credit side."

This principle applies with full force to a running account between a commission merchant and his customer, and the fact that it was so understood and acted on by the plaintiffs is proved by the account stated.

The fifth and sixth exceptions are allowed.

This makes it unnecessary to consider the other exceptions, for the exceptions allowed discharge the liability of the defendant W. H. Smith, leaving a large balance to be applied to the indebtedness of C. S. Smith. There will be judgment in favor of W. H. Smith, and the judgment below is reversed as to him.

PER CURIAM. Judgment accordingly.

Cited: Hawkins v. Long, 74 N. C., 783; *Vick v. Smith,* 83 N. C., 83; *Latham v. Wilcox,* 99 N. C., 374; *Lester v. Houston,* 101 N. C., 609; *Wallace v. Grizzard,* 114 N. C., 495.

(308)

E. M. HOLT v. GEORGE F. BASON, admr., and others.

Where a plaintiff alleges that he was induced to purchase a tract of land sold by a sheriff by the conduct of one who had a prior judgment lien on said land, and who was present and also bid at the Sheriff's sale: *It is error* in the Court below to treat an issue involving the fact as to whether the plaintiff was so induced as alleged, as a question of law, and refuse to submit the same to the jury, and to reject the evidence offered to disprove it.

(*Scott v. Dunn*, 21 N. C., 425; *Saunderson v. Ballance*, 55 N. C., 322; *Laws v. Thompson*, 49 N. C., 104, cited and distinguished).

ACTION, tried before *Kerr, J.*, at Fall Term, 1874, ALAMANCE. The facts in the case, as disclosed by the record, are fully stated in the opinion of the Court.

Scott and *Boyd*, for appellant.
W. A. Graham and *Graham & Graham, contra.*

BYNUM, J. In 1862 R. Y. McAden obtained a judgment in Caswell County for a large sum against William Kirkpatrick, who died in Alamance County in 1865, leaving a last will, and Henry Deshough as his executor. In 1867 G. W. Swepson obtained a judgment in Alamance County against Deshough as executor of Kirkpatrick. The executor had administered a part and wasted the residue of the personal assets and had become insolvent. Through some inadvertence or mistake not explained, an execution was issued upon the Swepson judgment and levied upon the land of the testator, which was exposed to sale by the Sheriff in 1869. At the sale, McAden, as the attorney of Swepson, was present and bid for the land against the plaintiff, who became the purchaser at the sum of $675. Deshough was afterwards removed from the executorship, and the defendant Bason was appointed in his place administrator *de bonis non* with the will annexed, who, treating the sale as void, instituted pro- (309) ceedings to sell the land for assets, and by the judgment of the Court did sell the same for $925, which sum he now holds, and which is all the estate of the testator now remaining, and is insufficient to discharge the McAden judgment, which has the priority. The plaintiff has brought this action for the purpose of being substituted as a judgment cred-

itor in the place of McAden, to the extent of the sum he paid upon the Swepson execution at the void sale. He bases his whole equity to this relief against McAden upon the allegation that he, McAden, attended the sale made by the Sheriff, and then, by bidding for the land, induced the plaintiff to bid and to become the purchaser and pay the said sum of $675 upon the execution of Swepson. McAden, in his answer, admits his presence at the sale, and that as the attorney of Swepson and for his benefit he did bid on the land, but he positively denies that his conduct there was calculated to induce or did in fact induce the plaintiff to purchase. An issue of fact was thus raised by the pleadings, which went to the whole merits of the plaintiff's claim to relief. His Honor, however, refused the application of the defendant McAden to submit this issue to the jury, and refused to admit the testimony which he offered on the trial to show that Holt was not induced to bid by him and that he had admitted that he was not thus induced.

His Honor did submit to the jury the following three issues, to-wit:

1. Did the plaintiff, supposing that he was the purchaser at the said execution sale, pay $675 in satisfaction of the Swepson judgment?

2. Was McAden the attorney for Swepson, and did he attend the sale and bid for the land, and did he receive the money and apply it to the execution?

3. Was there such a judgment as that alleged by McAden in his answer in his favor in the Superior Court of Caswell?

It is remarkable that the answer explicitly admits all that is contained in the two first issues, and therefore it (310) was supererogatory to submit them to the jury. It is more remarkable that the third issue submitted to the jury was a dry issue of *law;* most remarkable of all, this issue of law was the only one of the three which they responded to by their verdict, the only verdict returned by the jury being in these words: "That the judgment of R. Y. McAden, in the Superior Court of Caswell, against William Kirkpatrick and H. J. Deshough, for the sum of $1,833.34, whereof the principal sum is $1,432.50, was obtained in good faith, at Fall Term, 1862, of Caswell Superior Court."

After refusing to submit to the jury the issue before indicated as the material one, his Honor proceeded himself to find "that the conduct of R. Y. McAden was such as to mislead the plaintiff and induce him to believe that the sale was under a valid execution," and then, as a conclusion of law, adjudges that the administrator shall pay over to the plaintiff out of the fund in his hands, which McAden claimed as applicable to his judgment, so much as the plaintiff had paid on the Swepson execution. If the jury, on a proper issue submitted, had found the facts to be as his Honor found them, the question which all the parties intended to raise would have been fairly before the Court. But whether, even then, there is any principle of law or equity which would entitle the plaintiff to the relief he seeks in this action, is a question not necessary to be decided now, as the defendants are entitled to a *venire de novo* for the error in not submitting the issues of fact to the jury. It may be remarked for the reflection of the plaintiff, in the further prosecution of this action, that the decisions in our State draw a well-defined distinction between the rights and duties of purchasers at execution sales and sales made by executors, trustees and other vendors. The plaintiff does not ask to be subrogated to the rights of Swepson, who has his money and is the only party benefited, for the obvious reason that prior judgments will exhaust the fund before the Swepson judgment is reached. *Scott v. Dunn,* 21 N. C., 425. Nor does he bring his action under Rev. Code, (311) ch. 45, sec. 27, against the defendant in the execution, because the estate is insolvent and can afford him no relief. *Laws v. Thompson,* 49 N. C., 104. Nor yet can he bring his case within *Saunderson v. Ballance,* 55 N. C., 322, where the part owner of land stands by and sees it sold by a trustee as the land of another, and permits the purchaser to pay for it and take a deed, under the belief that he was getting a good title. But Holt is a purchaser at execution sale. The rule there is that the Sheriff sells only the interest of the defendant in the execution. If the defendant has an interest, well and good; if he has none, it is the purchaser's own lookout, for he buys at his peril, and as a general rule, he is entitled to no relief as against creditors. In this case it would seem that the plaintiff, by his own showing, was guilty of gross neglect of a plain duty. Had he even looked at the execution he

would have seen that the Sheriff had no right to sell and could make no title. He acquired nothing by his purchase, not because McAden had the title, for he had no title, and his judgment was not so much as a lien upon the land, but because the Sheriff had no authority to sell, and that fact the plaintiff was as much obliged to know as McAden was. Both were shooting wild and it so happened that McAden's ammunition gave out first.

As, however, the record and statement of the case sent up are loose and defective, and another trial may present additional facts, and, it is hoped, more precisely and consistently stated, we leave the case with the foregoing suggestions, deciding only that the defendants are entitled to a new trial for the error in regard to the issues.

PER CURIAM. *Venire de novo.*

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(312)

F. S. FAISON v. R. D. MCILWAINE and others.

1. No party to a suit is permitted by a new and independent action to pray for an injunction to seek any relief which he might obtain by a motion in the original cause.

2. *It is error* to grant an injunction staying execution on a judgment in the absence of notice to the plaintiff and of an affidavit stating a definite sum by way of set-off claimed, or to stay execution upon a judgment under an undertaking in a less sum than such judgment.

3. *It is error* also to refuse a motion to vacate an injunction when every material allegation in the complaint is positively denied by the answer.

(*Mason v. Miles*, 63 N. C., 564; *Jarman v. Saunders*, 64 N. C., 367; *Whitehurst v. Green*, 69 N. C., 131, cited and approved).

ACTION for an injunction against the collection of a judgment, tried at the Spring Term, 1874, of NORTHAMPTON, before *Albertson, J.*

On 18 October, 1873, the plaintiff commenced by summons a civil action, returnable to Spring Term, 1874, of the Superior Court, and upon a sworn complaint prayed his Honor to grant an order of injunction restraining the collection of an execution which had been issued on a judgment which

the defendants in this action had obtained against him at Spring Term, 1873, of the said Court, for the sum of $1,879.80 and costs.

Upon the plaintiff's affidavit, his Honor granted the injunction. At Spring Term, 1874, a motion was made, founded on affidavits, to vacate said injunction:

1. Because it was improvidently granted.

2. Because every material allegation in the complaint was fully and positively denied by the answer, and

3. Because the plaintiff's remedy, if he has any, was by a motion in the original cause.

His Honor denied the motion, and made the following order:

"Notice having been given the plaintiff, and the (313) motion coming on to be heard, etc., and being considered by the Court, the motion to vacate the judgment is denied, and it is ordered and adjudged that the execution be superseded and recalled. And to give effect to the agreement of parties and the conditions annexed to said judgment it is ordered and adjudged that the parties select each an arbitrator within thirty days after the expiration of the present term, who shall upon notice given of time and place of sitting, proceed to pass upon and determine the validity and amount of the claims of the defendant" (the present plaintiff), "as stated in said agreement, and in case of disagreement, that they appoint an umpire; and that they make their award, and return the same to the office of the Superior Court Clerk as soon thereafter as practicable; and that the amount so ascertained and awarded be entered as a credit on the plaintiffs' judgment, and that the plaintiffs have execution for the residue of said judgment reduced by the sum so awarded by the arbitrators as aforesaid," etc.

From this judgment the defendants appealed.

The agreement above alluded to was in effect that although a judgment was taken against the plaintiff in this action at Spring Term, 1873, still execution was not to issue until a certain time, and in the meanwhile he was to submit whatever set-offs he might have to such judgment to arbitration.

R. B. Peebles, for appellants.

W. W. Peebles and *Smith & Strong, contra.*

RODMAN, J. It is well established in this State that no party to a suit is permitted by a new and independent action praying for an injunction to seek any relief which he might obtain by motion in the original action. *Mason v. Miles,* 63 N. C., 564; *Jarman v. Saunders,* 64 N. C., 367.

In this last case a proceeding like the present was regarded as a motion in the original action, but the decision on that point of practice was there put on the ground that the Code of Civil Procedure had been but recently introduced,
(314) and the practice arising out of it could not be supposed to be known to the profession universally. That excuse for irregularity should by this time have ceased to exist.

The present plaintiff might have obtained the relief he seeks by a motion in the original action, as upon an *audita querula,* which the Judge would have allowed on such terms as might be just. Waiving, however, this objection to the proceedings, his Honor was clearly improvident in restraining "all proceedings, whether of sale or *otherwise,*" on the judgment in the original action. Whether we consider it as an original action for an injunction existing outside of and additional to the cases mentioned in sec. 189 of the Code of Civil Procedure, or as a motion to stay execution, it is open to the same substantial objections. It was issued without previous notice to McIlwaine, and for an indefinite time. (C. C. P., sec. 349). But independent of these objections, and considering the propriety of issuing it on the assumed truth of Faison's affidavit, he shows no ground *for such an injunction as was ordered.* By the agreement McIlwaine was to have execution after Fall Term, 1873. Faison alleges no ground for staying execution except—

1. That McIlwaine had failed to name an arbitrator upon his offer to name one within twenty-four hours after McIlwaine had done so. By the agreement it was not provided that either party should take precedence in naming an arbitrator. As it was most to the interest of Faison to have the arbitration, it may be that it was his duty first to name one. But supposing the default in this respect equal, there was nothing in it to deprive McIlwaine of his stipulated security by an execution and levy.

2. He alleges that he has effects and counter-claims which he believes and alleges would *greatly reduce the judgment.*

He admits that if all his counter-claims were allowed there would still be a balance against him.

He does not name any amount for his set-offs and counter-claims, which certainly ought to have been within his knowledge. If a precise sum had been stated as the (315) set-off it would have been proper for the Judge to have required an undertaking in that amount, and to have permitted McIlwaine to proceed with his execution for the residue. In this way the rights of both parties would have been secured. By what means the Judge came to the conclusion that Faison had a just or probable set-off to the amount of $1,289 we do not know. Nevertheless, he restrained McIlwaine from levying for any part of his judgment for $1,789, and required Faison to give an undertaking for only $500, leaving the residue of the judgment wholly unsecured. We think the Judge erred in granting an injunction against any part of the judgment, in the absence of an affidavit to a definite sum by way of set-off, and especially in staying execution upon the whole judgment, upon an undertaking for much less than its amount. This Court had occasion in *Whitehurst v. Green,* 69 N. C., 131, to remind the Judges of the Superior Courts of the danger of hasty and improvident orders of injunction, especially when made without notice to the adverse party. Constant experience makes the necessity for caution more apparent. By the law before the Code of Civil Procedure, no injunction could be obtained against a judgment for money except on giving a bond in double the amount of the judgment. By the Code of Civil Procedure the amount of the undertaking in such cases is left discretionary with the Judge, which is the better way if the Judge will take the time to give the case a sufficient consideration.

At Spring Term, 1874, the defendant McIlwaine filed an answer denying the alleged counter-claim of Faison, and moved to vacate the injunction. This his Honor refused to do, and ordered that the parties appoint arbitrators according to their agreement, from which order McIlwaine appealed to this Court. If the original injunction was improvident, *a fortiori,* the Judge erred in refusing to vacate it after the answer. He should have required Faison to state definitely the amount of his counter-claim, and have allowed execution for the admitted excess.

(316) It is not material in revising his Honor's judgment, but it may be well enough to state that after the judgment appealed from, the arbitrators decided that Faison had counter-claims to an amount less than $500, leaving a residue of over $1,289 due to McIlwaine.

The Judge erred in ordering the injunction, and also in refusing to vacate it.

PER CURIAM. Judgment vacated.

Cited: Lord v. Baird, 79 N. C., 9; *Murrill v. Murrill,* 84 N. C., 184; *Grant v. Moore,* 88 N. C., 78; *Featherstone v. Carr,* 132 N. C., 801.

J. C. HALYBURTON v. THOMAS S. GREENLEE and SAMUEL H. FLEMMING.

1. The sale of land under execution in nowise affects the lien of a prior judgment, nor does it necessitate any change in the proceedings required to make such liens effectual.

2. If, therefore, a sale of land is made under a junior docketed judgment, the purchaser buys in effect only an equity of redemption; that is, the title to the land upon paying off prior liens. If he neglects to pay off the prior liens, the prior judgment creditor may enforce his lien by a sale.

ACTION to recover possession of land and damages, tried at the Fall Term, 1873, of MCDOWELL, before *Henry, J.,* upon the following case agreed:

"The plaintiff is the purchaser at a sheriff's sale, under a judgment obtained in the Superior Court of Burke County, at Fall Term, 1869, commencing on the tenth Monday after the third Monday in August, 1869, being 25 October, (317) 1869, by Jacob Harshaw's executors against Robert Burgin, Alney Burgin and the defendant Thomas S. Greenlee, all defendants, of McDowell County, in the Superior Court of which said judgment was duly docketed on 15 November, 1869. An execution issued from the Superior Court of Burke on said judgment, to the Sheriff of McDowell County, which came to hand on 3 December, 1869,

returnable to the Spring Term, 1870, which was levied upon the land in controversy by the Sheriff of McDowell on 12 May, 1870, and returned according to law. A writ of *ven. ex.*, with a special *fi. fa.* clause, issued to the Sheriff of McDowell on 9 August, 1870, returnable to the Fall Term, 1870, of said Court, commanding him to sell the lands heretofore levied upon by him to satisfy said judgment, and return with said money to Fall Term, 1870, under the said *ven. ex.* The Sheriff sold the land at public sale as commanded, when the plaintiff became the purchaser, and the Sheriff made him a deed therefor, which has been duly proved and registered in McDowell County. And this action is brought by the purchaser to obtain possession of the land, etc.

"The defendants claim possession of the land in controversy, and defend this action under a judgment obtained by the defendant Samuel Flemming, or rather W. W. Flemming, former guardian of Samuel, against the defendants Thomas S. Greenlee and James M. Greenlee, at Spring Term, 1869, of McDowell Superior Court, upon which an execution issued on 3 December, 1869, returnable to Spring Term, 1870, of said Court, which came to the hands of the Sheriff on 12 April, 1870, with this endorsement: 'Levy made; execution held up; lack of time.' Said judgment was carried forward by the Clerk on the judgment or execution docket without issuing any further execution to the Sheriff from term to term, until 28 December, 1871, when an execution or *fi. fa.* was issued commanding the Sheriff to make the money so recovered, etc., and return the same to Spring Term, 1872. On 2 January, 1872, the Sheriff under this last *fi. fa.* levied upon the land in controversy, and on 27 March (318) following, after due advertisement, sold the same, when the defendants became the purchasers, the Sheriff conveying the same to them on 27 March, 1872.

"On 9 January, 1873, the defendant Greenlee leased from Samuel Flemming the said lands in writing, and keeps possession under that lease. This Court permitted Samuel Flemming to defend as landlord."

Upon this agreed state of facts, his Honor being of opinion with the defendants, gave judgment of nonsuit against the plaintiff. From this judgment the plaintiff appealed.

Gaither and *Bynum,* for the appellant.
Folk & Armfield and *W. W. Flemming, contra.*

RODMAN, J. At Fall Term, 1869, of Burke Superior Court, Harshaw recovered a judgment against Thomas S. Greenlee and others, under which the land now sued for was sold as the property of Greenlee, a defendant in this action, and purchased by the plaintiff.

At Spring Term, 1869, of the Superior Court of McDowell, Flemming recovered a judgment against the said Greenlee, and under it the same land was sold and purchased by Flemming, who permitted Greenlee to remain in possession as his tenant, and who, on the institution of this action, was allowed to defend as landlord. The sale at which Flemming purchased was after the sale at which plaintiff had purchased.

Greenlee of course could make no defense to the action of the plaintiff; but Flemming is entitled to set up any title he may have.

The question presented is, Did the plaintiff acquire by his purchase in 1870 (as it may be assumed to have been, although it is not expressly so stated) an absolute title to the land independent of the lien of any judgment previously docketed, or was his title subject to such prior lien so that it might be divested by a sale under it?

(319) Before the enactment of the Code of Civil Procedure in 1868, there could have been no difficulty in answering this question. The sale by the Sheriff under a junior execution passed to the purchaser all the title of the defendant in the execution, subject to equities existing against his estate, but clear of any liens existing by reason of any prior judgment, or execution of prior *teste,* or prior levy. The creditors were left to contest their respective priorities on the distribution of the fund. *Woodly v. Gilliam,* 64 N. C., 649. Probably this holding was necessary by reason of the fact that an execution might issue from a court of any county to any other county, and inasmuch as it made a lien from its *teste* it was impossible for any purchaser at an execution sale to know whether he was buying an estate incumbered with the lien of a prior execution or not. He could not search the record of every court in the State.

The Code of Civil Procedure enacted in 1868 made a material change. By this a judgment became a lien on the land of the defendant when it was docketed in the county in which the land was situated. Every bidder at a sale might henceforth by reasonable care know of every incumbrance by judgment upon the land, and must be held to buy subject to such incumbrance of which he has, or must be held to have, notice. If, therefore, a sale of land is made under a junior docketed judgment, the purchaser buys in effect only an equity of redemption; that is, the title to the land upon paying off prior liens. If he neglects to pay off the prior liens the prior judgment creditor may enforce his lien by a sale, just as a prior mortgagee might do; and to give this sale any effect at all it must pass the title in the land to the purchaser, subject, of course, to any prior liens, but paramount to the title of a former purchaser under a junior judgment.

We find this to be the law in other States which have laws similar to ours contained in C. C. P. As the question in its present aspect is somewhat new to us, I will quote a paragraph from Freeman on Judgments, giving the construction of similar laws in some other States. Section 337, p. 326: "The sale of lands under execution in nowise (320) affects the lien of a prior judgment, nor does it necessitate any change in the proceeding required to make such lien effectual. *Lathrop v. Brown,* 23 Iowa, 40. The holder of the elder lien may at any time during the life of his lien sell the land previously sold under a junior judgment. Upon the expiration of the statutory period of redemption he may take out his deed, and thereby obtain title paramount to and free from all sales and claims based upon junior liens. *Rankin v. Scott,* 12 Wheat., 177; *Littlefield v. Nichols,* 42 Cal., 372."

"The sale of lands under a junior judgment passes title subject to all prior liens. The money produced by such sale, therefore, cannot be applied to the satisfaction of such liens; but must to the extent of his debt be given to the creditor under whose judgment it was realized. *Bruce v. Vogle,* 38 Mo., 100." There is no error.

PER CURIAM. Judgment of nonsuit against plaintiff according to case agreed.

Cited: Isler v. Colgrove, 75 N. C., 343; *Crews v. Bank,* 77 N. C., 113; *Currie v. Clark,* 90 N. C., 363; *Meyers v. Rice,* 107 N. C., 31; *Bernhardt v. Brown,* 118 N. C., 710; *Wilmington v. Cronly,* 122 N. C., 388.

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(321)

CAROLINE FAW and others v. JAMES WHITTINGTON.

1. Where a defendant relies upon a renunciation of a contract in relation to the sale of land by the plaintiff, it is his duty to make it out unmistakably, and that he himself had assented to it.

2. The acts and conduct constituting an abandonment by the vendee of his contract of purchase of land must be positive, unequivocal, and inconsistent with the contract. Mere lapse of time or other delay in asserting his claim, unaccompanied by acts inconsistent with his rights, will not amount to a waiver or abandonment.

(*Crawley v. Timberlake,* 37 N. C., 460; *Falls v. Carpenter,* 22 N. C., 237; *Dula v. Cowles,* 52 N. C., 290; *Sugg v. Stowe,* 58 N. C., 126; cited and approved).

ACTION, tried before *Cloud, J.,* at August (Special) Term, 1874, WILKES. The only issue submitted to the jury was: "Did Absalom Faw or the plaintiffs abandon or renounce the right to redeem the land described in the complaint?"

There was evidence tending to show an abandonment, but no written evidence of any renunciation or abandonment.

The plaintiff asked the Court to instruct the jury "that the right to redeem was an interest in land, and could not be renounced or abandoned, surrendered or transferred by Absalom Faw or plaintiffs, except by some writing." The Court declined to charge as requested, but told the jury they must consider all the evidence, and although there had been no evidence of any such surrender, abandonment or renunciation in writing, yet if they were satisfied that Absalom Faw or the plaintiffs had abandoned the right to redeem, they should so find; but unless the defendant had so satisfied them, they should not so find.

The jury rendered a verdict in favor of the defendant, and judgment was given accordingly.

The plaintiff moved the Court for a new trial. The rule for a new trial was discharged, and the plaintiffs appealed.

Folk & Armfield, for appellant. (322)
Furches, contra.

BYNUM, J. So long as a contract for the sale of land remains executory either party to it has the right to enforce a specific performance of it against the other, and when such performance of the contract would be decreed against the original parties to it, it will be decreed between all claiming under them if there are no intervening equities controlling the case. If, therefore, Absalom Faw, the original party, could have called for a conveyance of the land from the defendant, then his heirs and widow, who are the plaintiffs in this action, and as such clothed with his rights, are entitled to the same relief. This is admitted by the defendant. But he sets up the defense that Faw in his lifetime renounced and abandoned his right to redeem the land, and upon the trial below this issue was submitted to the jury, to-wit: "Did Absalom Faw or the plaintiffs abandon or renounce the right to redeem the land described in the complaint?" It was admitted that there was no written evidence of any abandonment, and the counsel for the plaintiffs asked the Court to instruct the jury "that the right to redeem was an interest, and could not be renounced or transferred by Faw or the plaintiffs except by some writing." This instruction was declined by the Court, and the jury were directed that "although there was no evidence of a renunciation or abandonment, in writing, yet if they believed that Faw or the plaintiffs had abandoned or renounced the right to redeem, they should so find." Was this the proper instruction?

The defendant had acquired the legal title and had agreed in writing to convey the land to Faw on the payment of the purchase money laid out by the defendant, and this contract had established between them the relation of vendor and vendee, or mortgagor and mortgagee. As under the statute the vendee could acquire an interest in land by written agreement only, the general principle is that he can pass it in the same way only, else the effect would be to create a new con-

tract transferring an interest in land by parol only. (323) It cannot be denied that there may be a parol waiver or renunciation of many rights touching land which are often secured by the written contract; as in *Crawley v. Timberlake,* 37 N. C., 460, where it was held that the purchaser by his conduct waived his right under the contract to covenants of title; or, as in *Burnett v. Brown,* 1 Jac. and Walk., 168, in which it was held that where a purchaser after the delivery of the abstract, which disclosed a reservation of the right of sporting not before communicated to him, entered into possession and paid a greater part of the purchase money without objecting to the reservation, he was considered as having waived the objection, though he afterwards raised it, and he was compelled to a specific performance without a reference and without compensation. In such cases, without hearing the purchaser's objections to the title, the Court will decree specific performance, holding the conduct of the party to be a waiver or renunciation of rights touching land, which he could otherwise have asserted. But the statute has no application to stipulations inserted *in* the contract which may be abandoned by parol without impairing the validity of the contract as to the *corpus* of the land. While the general rule is that the same formalities are required by the act to create and transfer an interest in land, a distinction is made between contracts to "sell or convey," which are the words used in the act, Bat. Rev., ch. 50, sec. 10, and contracts or agreements made between vendor and vendee, mortgagor and mortgagee, after that relation between them is established, and which are intended to terminate that relation. In *Falls v. Carpenter,* 22 N. C., 237, Falls held a bond for title and Carpenter held his notes for the purchase money. Carpenter having the legal estate, sold to Burchet with notice. Upon a bill for specific performance filed by Falls the defendants took the ground that Falls by his conduct had abandoned his right to a specific performance. But what acts on the part of Falls would have amounted to an abandonment was (324) not decided, because it was there held that the acts proved did not constitute such an abandonment as would forfeit his claim to a specific performance. But in that case it is clearly intimated by *Ruffin, C. J.,* that if Falls had

surrendered to Carpenter the bond for title and Carpenter had delivered up the notes and resumed his possession, these acts, or others equivalent thereto, would have constituted such an abandonment or renunciation; or at least to the extent that the Court of Chancery would not have exercised its jurisdiction and decreed a specific performance, but would rather have left the party to his action at law. Such a renunciation, however, would seem to operate not as passing an estate or interest in land, which cannot be done strictly under the act without writing, but to operate as an equitable estoppel in the vendee to assert a claim to specific performance where his conduct has misled the vendor intentionally. Assuming the law to be that a vendee can abandon by matter *in pais* his contract of purchase, it is clear that the acts and conduct constituting such abandonment must be positive, unequivocal and inconsistent with the contract. The mere lapse of time or other delay in asserting his claim, unaccompanied by acts inconsistent with his rights, will not amount to a waiver or abandonment. What amounts to an abandonment is a question of law, but his Honor in our case did not submit the issue to the jury in that light, but left it to them without proper instructions to find both the law and facts. The instructions should have been that the contract is considered to have remained in force until it is rescinded by mutual consent, or until the plaintiffs do some acts inconsistent with the duty imposed upon them by the contract which amount to an abandonment. *Dula v. Cowles,* 52 N. C., 290.

If the defendant relied upon a renunciation of the contract by the plaintiffs it was his duty to make it out unmistakably, and that he himself had assented to it. No facts are set forth in the case from which this Court can see that there was an abandonment, but enough is alleged in the complaint and admitted in the answer to show that the rights of the plaintiffs had not been renounced by them or by mu- (325) tual agreement of both parties. Time was not of the essence of the contract, and the defendant cannot rely on the statute (Rev. Code, ch. 61, sec. 19), which presumes the abandonment of the right of redemption after ten years after forfeiture, or the right of action has accrued. By the extension of the time of performance by the defendant from time

to time, the contract became a continuing one and neither party had been disabled from enforcing it.

The plaintiffs are therefore entitled to a specific performance of the contract upon payment by them of the money advanced by the defendant, and the value of such permanent improvements as he has put upon the land, and interest thereon, and he must account for the rents and profits he made or should have made upon the land while in his possession. *Sugg v. Stowe,* 58 N. C., 126.

The judgment is reversed and the case remanded, to the end that proceedings be had in accordance with the opinion in the Court below.

PER CURIAM. Judgment reversed.

Cited: Banks v. Banks, 77 N. C., 187; *Jones v. Mial,* 89 N. C., 92; *Herren v. Rich,* 95 N. C., 503; *Miller v. Pierce,* 104 N. C., 390; *Joyner v. Stancill,* 108 N. C., 156; *Holden v. Purefoy, Id.,* 167; *Boone v. Drake,* 109 N. C., 82; *Taylor v. Taylor,* 112 N. C., 30; *Sitterding v. Grizzard,* 114 N. C., 111; *Atkins v. Crumpler,* 120 N. C., 310; *Gorrell v. Alspaugh, Id.,* 368; *Hemmings v. Doss,* 125 N. C., 402; *Robinett v. Hamby,* 132 N. C., 356; *May v. Getty,* 140 N. C., 316; *Redding v. Vogt, Id.,* 567.

STATE v. SIMON DILDY.

1. The confessions of a prisoner to be competent evidence on a trial of murder must be voluntary:

2. *Therefore,* where the facts showed that the prisoner was pursued by three armed men, and being arrested, replied to the questions accusing him of the alleged homicide: *It was held,* that his confession under such circumstances could not be received as evidence against him.

INDICTMENT for murder, tried before *Seymour, J.,* at Fall Term, 1874, WILSON.

(326) The defendant, one Simon Dildy, was charged with the murder of Charles Goy. On the trial Henry Johnston, a witness for the State, testified: That he was one of a party that went out to arrest the prisoner on the day

of the homicide. That he and two others came up with the prisoner about twelve miles from the town of Wilson; that when these three (witness and two others) came up to the prisoner they had arms in their hands, but did not present them at the prisoner. They did not inform the prisoner that they had come to arrest him. The prisoner did not appear to be at all frightened. Under these circumstances witness asked prisoner what he was doing there. Prisoner replied that he was "just walking about." Witness then asked prisoner: "What made you kill Charles Goy?" Counsel for the prisoner insisted that his answer to this question should not be given by the witness for the reason that it appeared to the Court from the circumstances detailed that such answer was extorted or drawn out by undue influence, compulsion and terror brought to bear upon the prisoner by the witness and his companions.

The Court overruled the objection and the witness then testified that the prisoner inquired: "Is he dead?" To this witness replied: "You ought to know he's dead, when you killed him."

As witness was about to testify what the prisoner next said, counsel for the prisoner again asked the Court to exclude anything further to which the witness might testify as coming from the prisoner, for the reason that improper influence, compulsion and terror were brought to bear upon the prisoner by the witness and his companions.

The Court overruled the objection, and the prisoner excepted.

Witness then stated that the prisoner then and there confessed that he shot the deceased, saying that he thought to shoot him in the legs, but did not intend to kill him.

The counsel for the prisoner then moved to rule out this alleged confession and exclude it from the consideration of the jury, on account of the improper influence, compulsion and terror above mentioned. (327)

His Honor overruled the motion, and the prisoner again excepted.

There were other exceptions taken by the prisoner during the progress of the trial, but as they are not noticed in this Court, it is unnecessary to state them.

H. F. Murray, for the prisoner.
Attorney-General Hargrove, for the State.

READE, J. We should never ruthlessly invade the sanctuary of the prisoner's own breast for evidence to convict him. We should enter only, and even then with hesitation, when he voluntarily opens the door and invites us in. Here there is not a voluntary feature in the whole transaction connected with the prisoner's confession.

1. He was trying to escape and was twelve miles away when he was overtaken by three armed men who were in pursuit; and when asked by them, "What are you doing here?" he tried to evade by answering, "Just walking about."

2. He was then asked: "What made you kill Charles Goy?" Again he tried to evade by asking of them: "Is he dead?"

3. Instead of answering this question and awaiting his reply, they flout him and say: "You ought to know whether he is dead; you killed him."

Finding that he could not evade, and that there was no escape from answering, and unwilling to confess guilt, he at length answered: "I thought to shoot him in the legs; I did not intend to kill him." Now the question is not whether they used any words of threat or promise, but whether the confession was voluntary. That is the question. Here were three men in pursuit, with arms in their hands, who would take no evasion or denial; and yet there was not an answer of the prisoner which was not dragged out of him; and yet they say it was voluntary, because, they say: "The prisoner did not appear to be at all frightened." We are so con-
(328) stituted that a trifle may shake the nerves and flush the face; but when a great danger threatens harm, all our powers gather for the conflict, and we may appear composed. A timid lady may scream at a butterfly, and look a lion in the face if need be. But still, whether the prisoner appeared to be frightened or not, is not the question; but whether his confessions were voluntary. And it is very clear that they were not.

The error in admitting the confessions entitles the prisoner to a new trial, and therefore it is not necessary that we should decide several other points presented by the record.

We think, however, that it is not improper to remark that we have doubts whether the case, as presented to us now, is more than manslaughter.

PER CURIAM. *Venire de novo.*

Cited: S. v. Drake, 82 N. C., 594; *S. v. McDowell,* 129 N. C., 525; *S. v. Horner,* 139 N. C., 605.

DANIEL RAHITY v. CHARLES S. STRINGFELLOW and J. W. FRIEND, trustees of GEORGE D. WHITE.

A plaintiff in an attachment levied on the property of the debtor accepting a deed of trust from such debtor to all his creditors, and signing an agreement providing for the payment of the debts of the debtor *pro rata*, releases the lien acquired by the levy of the attachment, and must take his part with the creditors secured in the deed.

CASE AGREED, heard before *Watts, J.*, at chambers, 9 January, 1874, HALIFAX.

The following are the facts as agreed and signed by counsel:

On 8 December, 1873, the plaintiff, Daniel Rahity, sued out attachments in divers cases, before a justice of the peace in and for the county of Halifax, against the property of George D. White, a merchant doing business in the (329) town of Weldon in said county, upon the ground that said White was largely indebted to him, and that he was disposing of his property for the purpose of defrauding creditors.

Warrants of attachment in each case were issued by the Justice and placed in the hands of a constable, commanding him to attach so much of the goods and chattels of the said White as would be sufficient to satisfy the claims of the said Rahity, and safely keep the same to satisfy any judgment that might be recovered on said attachment.

The said constable by virtue of said warrant of attachment levied on the stock of goods of the said White in the said town of Weldon, on the said 8 December, and took the same in custody.

On 9 December one T. L. Emory, a creditor of White, filed a petition against the said White in the District Court of the United States for the Eastern District of North Carolina, alleging divers acts of bankruptcy, and praying that proper proceedings be had and taken to adjudge said White a bankrupt within the purview of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved 2 March, 1867, and that in the meantime a restraining order or writ of injunction be issued, commanding and enjoining the said constable and the said Rahity from selling, transferring or otherwise disposing of any and all the goods, wares and merchandise, or other property heretofore levied upon as above stated, until the further order of said Court.

Said petition coming on to be heard, before his Honor, *George W. Brooks,* Judge of said Court, on the 10th of said month, said restraining order or writ of injunction was granted and duly served, and said property delivered to and taken in the custody of the United States Marshal for said District on 11 December.

On 10 December a meeting of a majority, in number and value, of the creditors of George D. White was held in
(330) the city of Petersburg and State of Virginia, the residence of said Rahity, who was present, when and where George D. White and his wife, Della J. White, residents of said city, were by said creditors induced to and did execute and deliver to the defendants, J. W. Friend and Charles S. Stringfellow, a deed for certain purposes therein expressed, a copy of which is hereto appended. Said deed has been duly proven, admitted to probate and recorded.

On 11 December all of the creditors at said meeting, including Rahity, entered into and signed a release, a copy of which is hereto appended.

The defendants were furnished by said White with a list of his creditors, purporting to be full and complete, and at once took steps to notify said creditors of the execution of the aforesaid deed of trust, all of whom have come in and signed the agreement or release.

Thereupon the creditors represented by said trustees moved for and obtained an order dismissing the proceedings in

bankruptcy against George D. White. No adjudication of bankruptcy or appointment of assignee was made.

On 15 December, four days after he had become a party to the agreement or release aforesaid, the said Daniel Rahity prosecuted his claims against George D. White to judgment. No summons was served therein until the 13th of said month. The said trustees were not made parties to said proceedings. Soon after the said trustees took possession of the property mentioned in the deed of trust, to-wit, in January last, Rahity, by his attorneys, notified them that his debt was secured by a valid and binding lien upon the stock of goods of the said White, by virtue of the attachments aforesaid, levied thereon, and that he should insist upon the payment of his debt in full out of the proceeds of said stock, if sufficient for that purpose. They disputed the validity of the lien, but acknowledged the right of said Rahity to have his debt so paid, if the same was valid and binding according to the spirit and meaning of the deed of trust. The question submitted to the Court was as follows: Are the aforesaid attachments valid and subsisting liens upon the (331) property of the said George D. White upon which the said attachments were levied, and are the debts upon which the same were issued to be paid in full by the said trustees out of the proceeds thereof or *pro rata?*

The following is the deed executed by George D. White and his wife to J. W. Friend and Charles S. Stringfellow:

Whereas, George D. White is largely indebted and, by reason of inability to collect the moneys due him, is unable to meet his obligations; and whereas, proceedings in bankruptcy have already been instituted against him by one of his creditors; and whereas, at a meeting this day held in the city of Petersburg, representing in number and value the larger number of his said creditors, a desire was expressed to have the assets of the said White administered for their benefit by trustees of their own selection; and whereas, the said White is willing to carry out this desire, and to effectuate the same, and pay to the greatest extent his indebtedness aforesaid, and his wife is willing to relinquish her contingent dower right in the real estate hereinafter mentioned: Now, therefore, this deed made this 10 December, 1873, between George

D. White and Della J. White, his wife, of the first part, and J. W. Friend and Charles S. Stringfellow, of the second part, witnesseth, That the said George and Della J. White, his wife, in consideration of the premises, and the further sum of $10 cash in hand paid by the said Friend and Stringfellow, the receipt whereof is hereby acknowledged, do grant, with general warranty unto the said J. W. Friend and Charles S. Stringfellow, their heirs, administrators, executors and assigns, all the real estate now owned by the said George D. White in the town of Weldon, county of Halifax and State of North Carolina, consisting of two certain lots, with the storehouses now on them, in which said White has been doing business, wherein his stock of goods now lies, and one vacant lot purchased of J. T. Evans, all on the east side of Blount Street, in the town aforesaid; and the
(332) said George D. White further grants, gives, conveys and assigns to the said parties of the second part all of his bonds, notes, due-bills, open accounts and books, together with all of his stock of goods of every kind, sort and character now lying in said storehouses. In trust, nevertheless, to sell said stock of goods, and out of the proceeds to pay off equally and *pro rata,* without priority or preference, all of the creditors of said White who may come in and accept the provision and benefit of this deed and fully release and discharge said White from the excess of his indebtedness over and above what may be realized from this deed.

The said trustees being first allowed all the expenses attending the execution of this trust, including the usual commission of five per cent. on all sales and collections, as compensation for their time and trouble, it being understood that this deed is made subject to all valid and binding liens on either the real or personal estate hereby conveyed, and that such creditors as may hold such liens are to be paid in full. The said trustees shall have power to appoint and pay such agent or agents as may be necessary to enable them properly to carry out this trust; to compound, compromise and settle such claims, bonds, notes or open accounts as may be deemed by them doubtful or uncertain; to sell the real and personal estate hereby conveyed at such times and on such notice and in such manner, publicly or privately, as they may deem best for the interest of the creditors aforesaid, the trustees under

this deed, and generally to do all things that may lawfully be done which in their judgment will promote the interest and accomplish the ends of this trust. Witness, etc.

GEORGE A. WHITE, [SEAL.]
DELLA J. WHITE. [SEAL.]

The following release was executed in pursuance of the above deed, to-wit:

"We, the undersigned, creditors of George D. White, lately doing business in the town of Weldon, county of Halifax and State of North Carolina, do hereby assent to and accept the provisions of the deed made by said George (333) D. White and Della J. White to J. W. Friend and Charles S. Stringfellow, dated 10 December, 1873, and in consideration of the provisions and conveyances made by said White and wife in the deed aforesaid, and of the relinquishment of her contingent right of dower by said Della J. White, the wife of said George D. White, do hereby release, give up and discharge the excess of our respective debts, demands and claims against the said George D. White, above what may be realized from and under the said deed, and accept whatever sum or sums we may receive from the proceeds of the property, real and personal, conveyed for our benefit by said deed, in full satisfaction and discharge of all our said demands, and covenant not to sue said George D. White upon the same.

"But this agreement is not to be valid and binding unless the proceedings in bankruptcy already instituted against George D. White shall be withdrawn and dismissed, and said deed of 10 December assented to, and this agreement and discharge signed by all the creditors of said George D. White. And it is further understood that the same is not to be binding on any parties whose signatures are hereto attached, who hold notes, bonds, or claims against said White, unless the endorsees or sureties to the same, if any, shall also assent hereto, in evidence of their agreement to this release, and that the same is made with their full assent and concurrence and will not be used in any proceeding in law or equity against them by the holders of the bonds, notes, bills, etc., upon which they are liable as endorsees or securities as aforesaid."

All the known creditors of George D. White executed the above release.

Upon motion, his Honor dismissed the action; and from this judgment the plaintiff appealed.

Hill, Day and *Conigland,* for the appellant.
Smith & Strong, contra.

(334) READE, J. We are of the same opinion with his Honor below that the plaintiff, by accepting the terms of the deed in trust and signing the agreement of the creditors, released his lien of attachment, if, indeed, he had any lien, and must take his stand with the other creditors and share *pro rata.*

PER CURIAM. Affirmed.

WILLIAM BURNETT and others v. THOMAS W. NICHOLSON and others.

1. An injunction will not be granted to restrain the erection of a dam whereby the mill-wheel of the plaintiff is flooded so as to become useless.

2. For such an injury damages will adequately compensate, and should the annual damage exceed twenty dollars the plaintiff is remitted to his common-law action, and can compel an abatement of the nuisance.

(*Pugh v. Wheeler*, 19 N. C., 50; *Johnson v. Roan*, 48 N. C., 523, cited and approved).

ACTION for an injunction, heard before *Henry, J.,* at Fall Term, 1874, HALIFAX.

The facts as found by the Court were as follows:

The plaintiffs are owners of a grist-mill. The defendants owning land below them were erecting a dam on the same water-course within six hundred or a thousand yards below, and so close to plaintiffs' mill as to back the water on the wheel of said mill to such an extent as to prevent the turning of the same and to submerge it to the depth of about three feet, thereby seriously damaging and rendering entirely useless or of no value said mill.

Upon this state of facts the defendants were ordered to show cause at the next term of the Court why the injunction should not be granted, and in the meantime were restrained from erecting said dam. (335)

At Fall Term, 1874, the case coming on to be heard, on affidavits and the arguments of counsel, the restraining order was vacated and a reference ordered to state an account of the damage sustained by defendant by reason of said restraining order. From this judgment the plaintiffs appealed.

Batchelor, for appellants.
Walter Clark, contra.

PEARSON, C. J. The answer and the affidavits filed by the defendants so fully meet the supposed equity of the plaintiffs that his Honor was obliged to refuse to continue the injunction. In *Johnson v. Roan,* 48 N. C., 523, it is held that although the ponding back of water by a mill-dam does not actually overflow any land outside of the banks of the stream, but so obstructs the flow of the water as to prevent land from being drained, the owner of the land is entitled to damages under the Act of 1809. In *Pugh v. Wheeler,* 19 N. C., 50, it is held that ponding water back in a stream so as to obstruct the motions of the plaintiff's wheel is a case within the operations of the act referred to. The subject is there so elaborately discussed by *Ruffin, C. J.,* that it is not necessary to say anything more about it. But it is necessary to remark that the defendants were ill-advised in erecting their dam without first resorting to the remedy given by the Act of 1868-'69, which is a modification of the Act of 1809 (Battle's Revisal, ch. 72, secs. 4 and 8), by which three commissioners of view, like a jury of view, are to examine the premises and report, among other things, "whether the proposed mill will overflow another mill or create a nuisance in the neighborhood." And the plaintiffs were ill-advised in not resorting to the remedy given by secs. 13, 14 and 15 of said act.

We are unable to see the force of the position taken by Mr. Batchelor that ponding water back so as to flood the plaintiffs' wheel will cause "irreparable damage," and on that ground authorize a resort to the equitable jurisdiction (336) of the Court by injunction, instead of pursuing the remedy by petition and commissioners of view as provided by

the Act of 1868-'69. The injury done by overflowing land is just as irreparable as the injury done by flooding a water-wheel so as to make it wholly inefficient, or less so than it was before. Damages will compensate for either injury, and should the annual damage exceed twenty dollars the plaintiff is remitted to his common-law action and can compel an abatement of the nuisance.

PER CURIAM. Affirmed.

W. M. TALLY v. WASH. REID and JOHN C. SOSSAMER.

1. Where A contracted in writing to convey a tract of land to B, who paid a part of the purchase money, entered upon the land and then conveyed his interest to C, and a judgment being obtained against A, the land was sold: *Held*, that the purchaser at such sale acquired no title, as the interest of A was not liable to execution.

2. No equity can be sold under the Act of 1812, unless the sale of such equity draws to it the legal estate. This cannot be if other equities are attached to such legal estate.

(*Moore v. Byers*, 65 N. C., 240; *Sprinkle v. Martin*, 66 N. C., 55, cited and approved).

ACTION, tried by *Schenck, J.*, at Fall Term, 1874, CABARRUS.

On 15 October, 1859, John C. Sossamer was seized in fee of a tract of land lying in the county of Cabarrus. Sossamer contracted in writing to convey said tract of land to one Joseph Brown for the sum of five hundred and fifty dollars, payable by instalments in five years. Under this con-
(337) tract Brown paid a part of the purchase money, and took possession of the land.

In December, 1860, Brown conveyed his equitable interest in said land to the defendant Reid for a valuable consideration, and by a written instrument.

At May Term, 1870, of the Superior Court of Cabarrus County a judgment was recovered against Sossamer on a money demand, and duly docketed, and on 6 June, 1870, an execution issued thereupon. On 9 September said land was sold under said execution, the plaintiff becoming the purchaser, taking the Sheriff's deed therefor.

A portion of the purchase money due by Brown remained unpaid.

The defendant Reid was in possession of the land, receiving the rents and profits.

Upon this state of facts the plaintiff demanded a judgment that he be subrogated to the rights of the defendant Sossamer under said executory contract, and that a sale of said land be ordered to pay the rents and the unpaid purchase money.

The defendant demurred to the complaint, assigning as ground of demurrer:

1. That the complaint does not state facts sufficient to constitute a cause of action, in that plaintiff by his alleged purchase acquired no estate in the land, as the same was not subject to execution as the property of John C. Sossamer.

2. That there is a defect in parties, in this, that John C. Sossamer is a necessary party, either as plaintiff or defendant.

The complaint was amended by making Sossamer a party, and the demurrer sustained. From this judgment plaintiff appealed.

Bailey, Vance and *Dowd,* for appellant.
Wilson & Son, Montgomery and *R. Barringer, contra.*

READE, J. Until we had a statute allowing it, no equity in land was subject to execution sale. It follows that no equity is now subject, except such as is embraced in (338) the statute.

Sec. 4, Act of 1812, provides that where A holds land in trust for B the interest of B may be sold under an execution against him. And the purchase of such equity shall draw to it the legal estate which was in A. So that the purchaser got the whole title, legal and equitable. And the trustee A had no more to do with it. It was just the same as if A, the trustee, had, by deed, passed the legal title to B, and then it had been sold under execution against B, which would of course have passed the whole title, the land itself. It also follows that if B's equity was such as that he had no right to call upon A for the legal title, as if A had to hold the legal title to perform some other trust, then B's equity could not be sold; because the sale of B's right could not draw to it the legal estate

out of A, which B himself had no right to call for. And so the sale could not pass both the legal and equitable estate, the land itself, to the purchaser, as the statute required. And so it had to be held, that while a pure and simple trust could be sold under execution, yet a mixed trust could not be. For if the purchaser of a mixed trust sued the trustee for the legal title, the land itself, the trustee could defend by saying: "I am obliged to hold the legal title in order to perform another trust."

Sec. 5 of the same act provides for the sale under execution of an equity of redemption; and the same principles apply. A mortgages his land to pay $1,000. He has a pure and simple equity to call for the legal title upon paying the $1,000. All of which appears upon the mortgage deed. His equity may be sold, and the purchaser of his equity has the right to call for the legal title upon paying $1,000.

But where the transaction had become complicated, part of the debt paid, and part not paid, or subject to set-offs or other equities, involving an account, the law had no machinery for taking the account; it was not an unmixed equity, and therefore not subject to sale at law, but the rights had to be adjusted in a court of equity. No equity can be sold under the statute unless the sale of the equity can draw to it the
(339) legal estate, which cannot be if the legal estate is hitched to some other equity: because, then, equal forces are pulling in opposite directions. And it is not the policy of the law to sell uncertain interests, which would result in the sacrifice of property, and breed litigation. Just as we find in this case, a tract of land which had been purchased by the defendant at $500 was bid off by the plaintiff at execution sale at $60, because, as we suppose, no one knew what was sold.

It does not follow that an equity, other than those embraced in the statute, could not be subjected to the owner's debts. They may be subjected since the statute, just as they could have been subjected before, by a proceeding in equity.

What has probably misled the plaintiff is the principle that the legal title to land could undoubtedly be sold under execution, and the purchaser could recover the land in an action at law, and could be prevented only by injunction by a court of equity. A court of law said, You may sell the land;

a court of equity said, Although you have sold it, you shall not recover it against an equity. And so, although the sale was valid at law, yet, because of the injunction, it amounted to nothing.

Under our new system we have not one court to say yes, and another to say no, about the same matter. Both courts are now united in one, and speak the same word, yes or no. And when the Court is asked for an order to sell the legal estate, we have to say we will not grant it, because there is an equity which forbids it, and we will not do a vain thing.

The numerous decisions under the old system may be found in 3 Bat. Dig., title "Execution," what may be sold under execution. And our new system in Bat. Dig., same title. And see *Moore v. Byers,* 65 N. C., 240; *Sprinkle v. Martin,* 66 N. C., 55. The remedy for the plaintiff was an action in the nature of a bill in equity against the defendants. And with proper amendments, if allowed, this action might be treated as such. In such action the plaintiff would have an equity as against Sossamer of the value of what he bid and paid for the land and of his debt. Sossamer has an equity as against Reid to be paid the price, or (340) the balance of the price, at which he sold the land to Brown. And Reid has an equity to have the title made to him upon payment of the price. And if a sale be necessary, that can be ordered.

PER CURIAM. Affirmed.

Cited: Folger v. Bowles, post, 605; *Hinsdale v. Thornton,* 74 N. C., 173; *Tally v. Reid, Id.,* 463; *Isler v. Koonce,* 81 N. C., 379; *Love v. Smathers,* 82 N. C., 372; *Mayo v. Staton,* 137 N. C., 681.

JAMES B. DANIEL v. THOMAS M. OWEN.

1. A Superior Court has no power under sec. 1, ch. 22, Bat. Rev., to order a defendant to pay into Court on a day certain the amount of a *debt* due on a judgment, and in default thereof to attach such defendant for contempt of Court.

2. The courts still have power, where the relation of trustee and *cestui que trust* exists, to order a fund held in trust to be paid into Court, *to the end* that the fund should be put under the protection of the Court. Such an order is a lawful order within the meaning of the statute, and may be enforced by attachment for contempt.

ACTION for an injunction, tried before *Kerr, J.*, at Fall Term, 1874, of ORANGE.

The defendant moved for an order of injunction to restrain the plaintiff from collecting the amount due on execution, on account of an alleged error in entering judgment for an excessive amount. A restraining order had been issued on the affidavit of defendant until the hearing.

The defendant also moved to set aside the judgment, on account of a breach of agreement on the part of the plaintiff, and accident, mistake and excusable neglect on the part of the defendant.

The defendant produced the affidavit on which the restraining order had been granted, and another made before
(341) the Clerk of Orange Court. He also produced the original papers in the action on which the judgment was rendered.

Plaintiff on his part produced the execution and endorsement thereon, and offered his own affidavit and that of his attorney, William A. Graham, and a letter from the latter to R. M. Stafford, Sheriff of Guilford County, admitting error by inadvertence of the Clerk in issuing execution for too great an amount of interest, and directing that only the true amount due on the judgment should be collected.

The Court found the fact to be as stated in the affidavit of the plaintiff and that of his attorney, and overruled both motions of the defendant and dissolved the restraining order with costs.

On motion by the plaintiff, his Honor adjudged that unless the defendant should pay the amount of the judgment

and cost, and the cost of the proceedings of that term, before the end of the term, he should be attached for a contempt of Court. The defendant excepted.

Tourgee and *Gregory, Shipp & Bailey* and *Strayhorn,* for appellant.

W. A. Graham, contra.

PEARSON, C. J. The plaintiff obtained judgment by default against the defendant *for a debt,* sued out execution and had it levied on land. The defendant obtained a restraining order on the ground of a variance between the judgment and the execution. The restraining order was discharged upon the plaintiff's agreeing to correct the execution by making it conform to the judgment. Thereupon the defendant, on affidavit, moved to vacate the judgment on the ground of inadvertence, etc., under sec. 133, C. C. P. This motion was not allowed. Thereupon the plaintiff moved that the defendant be ordered to pay the amount of the judgment into Court, and on his failure, that an attachment issue for contempt in pursuance to the statute "Concerning Contempt," Bat. Rev., ch. 24, sec. 1, subdiv. 4, "Wilful disobedience of any process or order lawfully issued by any court." (342)

His Honor allowed the motion, and it was ordered that "the defendant pay into the office of this Court the whole amount due on the judgment aforesaid (the execution being corrected thereby), before the expiration of the present term of the Court," etc., and in case of his failure to make such payment, the Clerk shall issue a writ of attachment commanding the Sheriff to take the body of the defendant and keep him in close custody until he shall pay the amount due on the judgment and all costs, to-wit, etc.

The question is, Had his Honor power to make the order requiring the defendant to pay the amount of the judgment into Court? We declare our opinion to be, that this order is void and of no legal effect, and is not a "lawful order," because of a want of power in the Court to make it.

Under the old equity system the Chancellor had power to order one who held the legal title in trust for another, to execute a deed. So he had power to order a defendant who

held a fund in trust, whether it consisted of bonds or of money, to pay "the fund" into Court, to the end that the fund should be put under the protection of the Court. This power the Court still has under the new system in all cases where there is the relation of trustee and *cestui que trust,* and the land or the fund is, in contemplation of a court of equity, *the property* of the plaintiff in an action brought to enforce the equity, and an order made for the execution of a deed or the payment of the fund into Court is a lawful order within the meaning of the statute above cited.

In our case there is no relation of trustee and *cestui que trust,* no fund in the hands of the defendant to which the plaintiff has an equitable title, but the relation is that simply of a creditor who has obtained judgment against his debtor, and thereby merged the original debt into a higher security. But there is *no fund* to which he is entitled and for the protection of which he can invoke the aid of the Court; (343) the relation is merely that of *"creditor* and *debtor."*

The plaintiff can enforce payment of his judgment by a writ of *"fi. fa.,"* and under the old system by a writ of *ca. sa.,* under the new system (by which imprisonment for debt is abolished) by supplemental proceedings to reach causes in action and other intangible interests. If the Court has power in the case of *creditor and debtor,* when there is judgment, to order the defendant to pay the amount of the judgment into Court by a day certain under the pain of going to jail "without bail or mainprise" until he complies with the order, the condition of debtor will be worse than it was before the abolishment of imprisonment for debt, for whereas before he was allowed to give bond for his appearance, and to "swear out," or else to have the benefit of "the prison bounds," now under an order like that we are considering, he must go to jail and remain in close custody *until he pays the debt!*

Such is not the law. It has no principle of reason to rest on, and no authority can be found in all the books of reported cases to support it. There is not even a *dictum* in any of the books tending to give it countenance.

We would have been at a loss to imagine how the idea that the Court has any such power ever suggested itself, but for the fact that it appears by the record that after execution

issued upon the judgment and was levied on the land of the defendant, he obtained a restraining order upon what his Honor finds to have been a "frivolous pretext" because of a slight error in the execution, which the plaintiff's counsel was willing to have corrected, and when an injunction was refused he added to his enormity a motion to vacate the judgment on affidavit as to excusable neglect or inadvertence in failing to put in an answer to the complaint, which motion his Honor likewise refused, holding the affidavit to be insufficient. Thereupon his Honor made the order to pay the amount of the judgment into Court, etc. It has, heretofore, been considered that the offense of making a "sham defense" was amply discouraged by allowing the plaintiff to take judgment by default, and the offense of obtaining (344) a restraining order was amply discouraged by setting aside the order, at the cost of the defendant, and the offense of moving on affidavit to vacate a judgment on the ground of inadvertence, etc., was amply discouraged by refusing the motion and requiring the defendant to pay costs. Superadded to the fact, that if there be any false swearing in the premises, the party is liable to indictment for perjury. How a "sham defense" is a "frivolous pretext" for a restraining order, or a motion to vacate a judgment on an affidavit held to be insufficient can confer upon a Judge the power to order the defendant to pay the amount of the judgment into Court by a day certain on pain of being sent to jail and kept closely confined until the judgment is satisfied, is beyond our power of comprehension.

PER CURIAM. Judgment reversed.

Cited: Harris v. Harrison, 75 N. C., 435; *Light Co. v. Light Co.,* 116 N. C., 121.

(345)

STATE v. AUSTIN HILL, CORNELIUS WILLIAMS and ALFRED WALKER.

1. In an indictment against three for murder, charging that H, one of the prisoners, fired the gun, and that the other two were present, aiding and abetting: *Held*, that it was not error in the Court below to charge the jury that if either of the prisoners fired the gun, the others, being present aiding and abetting, were equally guilty.

2. Where, in an affidavit filed for the removal of a prisoner's case, the facts whereon the belief is founded are set forth, so that in the language of the statute "the Judge may decide upon such facts whether the belief is well founded," the Judge acquires complete and final jurisdiction, his decision not being the subject of review by this Court.

(*State v. Cockman*, 60 N. C., 484; *State v. Twitty*, 9 N. C., 248; *State v. Seaborn*, 15 N. C., 305; *State v. Hildreth*, 31 N. C., 429; *State v. Collins*, 70 N. C., 241, cited and approved).

INDICTMENT FOR MURDER, tried before *Henry, J.*, at Fall Term, 1874, NORTHAMPTON.

The defendant Austin Hill, upon affidavit, moved for the removal of the case from Northampton County. The following is the affidavit upon which the motion was based, to-wit:

STATE

v.

AUSTIN HILL, CORNELIUS WILLIAMS AND ALFRED WALKER.

The defendant Austin Hill makes oath that there are probable grounds to believe that justice cannot be obtained in this county, and he founds his belief upon the fact that the case has been very much canvassed and talked about by all classes of people in said county greatly to his prejudice; many men of position and influence in society have manufactured a prejudice against him, which he fears would prevent justice here.

His
AUSTIN X HILL.
mark.

(346) The motion was overruled by the Court, and the defendant excepted.

The defendant Hill, with the other defendants, then moved for a severance. The motion was overruled and the defendants excepted.

Mrs. Presson, the widow of deceased, was introduced as a witness on the part of the State, and testified as follows:

That soon after the clock struck nine P. M. she, her husband and the family retired; that soon thereafter some person spoke from the top of the hill, saying that Dr. Ramsay had two horses which he wished the deceased to put in the stable. She did not recognize the voice of that person, and did not know who it was. The deceased got out of bed, put on his shoes, and no other clothing, and went up on the hill towards the lot. In a few minutes thereafter she heard a noise like a slamming, and a few minutes afterwards a person came to the door of her house and said: "Miss Alice, your father wants you to send him his pocket-book." Alice got up and looked for the pocket-book; while she was looking for the pocket-book the person ran off, and soon thereafter the deceased came in and exclaimed: "Old Cornelius! old Cornelius; old Cornelius has shot me!" He also mentioned the name of Austin Hill, but did not say what Hill had done. No light was then in the house, but the lamp was then lighted and it was discovered that the deceased was wounded in the left side of the neck. About three-quarters of an hour afterwards the witness and her two daughters went up the hill, and by loud cries aroused the neighbors, all of whom were negroes, to-wit, Sam Williams, Wyatt Williams and Jack Norwood, and told them that old Cornelius had shot Mr. Presson. Witness, her two daughters and the three negroes went back and entered the house, when Mr. Presson took the hand of Sam Williams and told him something which the witness did not hear.

The State next introduced Martha Alice Presson, a daughter of the deceased, aged fifteen, who testified that her father was watchman of the Weldon bridge; that the family retired on the night of the homicide in the following order, to-wit, her father first, then her mother, then her sis- (347) ter, then herself. That soon after she retired some one, whose voice she did not recognize, called from the hill and said Dr. Ramsay had two horses which he wanted cared for. Her father kept stables for the accommodation of persons who go to Weldon from this side of the river. That her father hesitated, but concluded to go, got up and put on his shoes, but before he left the house the clock struck nine.

The clock was accurate and kept railroad time. That he had not been gone long before she heard something like a slamming. In about fifteen minutes after he left some one came to the house and told her her father said send him his pocketbook. That she recognized the voice of Austin Hill. The door was left open when he went out; she got up and went by the door that was open and passed through an entrance into the dining-room, where her father put his clothes, and she saw a man standing at the door. It was Austin Hill. When she returned from the dining-room and stated that she could not find the pocket-book, he stepped on the top step, but seeing her father coming from the hill he jumped off and ran. Her father came in and said: "Strike a light; old Cornelius has shot me." She knew Cornelius Williams; her father always called him Cornelius. She stayed in the house with him about half an hour, when her mother, her sister and herself ran up the hill and screamed. Sam Williams, Wyatt Williams and Jack Norwood came to them. In company with them they returned to the house. Her father took Sam Williams by the hand and told him something which the witness did not hear.

The State then introduced Thomas Devereux, who testified that on the night of the homicide he was at J. J. Long's (Norwood plantation), and intended to sleep that night outdoors under a tree, but had not gone to sleep. That about half-past eight o'clock he heard a noise as of the feet of horses, apparently going rapidly in the direction of Meed Castle, which is the way to the place of the homicide. On cross-examination the defendant's counsel asked the witness if he did not believe in ghosts, and if he had not frequently
(348) heard the noise of ghost horses, and if he could tell the difference of the sound made by real horses.

The witness responded that he had frequently heard the noise of ghost horses, but could tell the difference between that and real horses. His mind manifested to him the difference.

The Solicitor then asked the witness if he was not an illiterate person, not having had the benefit of an education, to which the witness replied that he was.

The witness left the stand; his Honor remarked to the counsel that one of North Carolina's most distinguished Judges was said to have believed in ghosts.

The defendant Williams relied upon an *alibi.*

In his charge to the jury his Honor said: "It is difficult for any person to swear positively as to time, at night, who has not examined a time-piece."

His Honor charged the jury "that the law as laid down by the counsel (naming him) was correct, and that he charged it as the law in this case," but did not repeat the language of the counsel.

His Honor also said that if the jury believed the testimony of Martha Alice Presson the defendant Hill was present at or near the house of the deceased about the time of the homicide.

That the theory of the State was that Alfred Walker stood at the lower gate of the lot. That the evidence did not show that there were two gates to the lot.

The counsel for the defendant Hill asked for the following instructions:

1. Unless the jury can find from the evidence that the gun, when fired, was in the hands of Austin Hill or Cornelius Williams, they must find Austin Hill not guilty.

2. There is no evidence that the gun was in the hands of Austin Hill.

3. If the dying declarations of the deceased are to be believed the gun was not in the hands of Austin Hill when fired. (349)

The first instruction was denied. As to the second and third his Honor said that he had already charged the jury that if they believed the defendants were all, or any of them, engaged in the homicide, it was not material who fired the fatal shot, but that all who participated in the deed were equally guilty.

The jury rendered a verdict of guilty. There was a motion for a new trial, the motion overruled and judgment pronounced, and the prisoners appealed.

W. W. Peebles, for the prisoners.

Attorney-General Hargrove and *Busbee & Busbee*, for the State.

BYNUM, J. This is an indictment against the prisoners, Hill, Williams and Walker, for the murder of Samuel Pres-

son. The first count charges that Hill fired the gun, and that the other two were present aiding and abetting; the second count charges that Williams fired the gun, Hill and Walker being present aiding and abetting in the homicide.

1. After the evidence was given the counsel of Hill asked the Court to instruct the jury that unless they found from the evidence that the gun when fired was in the hands of Hill or Williams, they must find Hill not guilty. This his Honor refused, and in that there is no error; for, suppose the gun was in the hands of neither Hill nor Williams, but was in the hands of the other defendant Walker. In such case all the authorities agree that would be sufficient to warrant the conviction of Hill and Williams, if they were present aiding and abetting. 2 Hale Pl. Cr., 292; 1 H. P. C., 437; 7 Co. Rep., 67a; 1 Bishop Cr. Procedure, 546; Arch., 6; *State v. Cockman,* 60 N. C., 484. How it would have been if some person, not named in the indictment, had fired the fatal shot, we are not called upon to decide, for there is here no allegation or evidence that such was the case.

(350) 2-3. The second and third instructions asked for were that there was no evidence that the gun was in the hands of Hill when fired, and that if the dying declarations of the deceased were to be believed, the gun, when fired, was not in the hands of Hill. These instructions were properly refused, because it was not at all material whether the gun was fired by Hill or not. His Honor, in substance and effect, charged the jury that if they were satisfied that the defendants were all, or any of them, engaged in the homicide, it was not material which of them fired the gun. We can see no error in this charge as applied to the very meager statement of the evidence set forth in the case.

4. When the case came on the prisoner Hill filed an affidavit setting forth that he could not have a fair trial in the county, and asked the Court to remove the action to another county for trial, which motion his Honor disallowed. Was this error? It is not denied that the affidavit states the causes for removal as fully as is required by the statute, Rev. Code, ch. 31, sec. 115; and the only question is, Was the removal a matter of discretion for the Judge? The first act upon the subject was passed in 1806, which declared that a removal shall take place when a party shall state on oath

"that there are probable grounds to believe that justice cannot be obtained in the county," etc. Under this act some of the Judges had scruples and believed they had no power to deny the application for removal when such an affidavit was made. It was to remove these doubts that the Act of 1808 was passed, which provided that no order of removal shall be made "unless on oath made, in which the facts whereupon the deponent founds his belief that justice cannot be obtained in the county where the suit is pending, shall be set forth that the Judge may decide upon such facts whether the belief is well founded." This latter act, though it solved some doubts, raised others, for in *State v. Twitty,* 9 N. C., 248, the affidavit for removal on the part of the State set forth that "the deponent believes the State cannot have a fair and impartial trial in the county of Burke"; whereupon the case was moved to the county of Lincoln, (351) and the party tried there and convicted. On appeal to this Court the judgment was arrested, upon the ground that the affidavit did not state the facts on which the deponent founded his belief, as was required by the Act of 1808, and so the Court of Lincoln had no jurisdiction. But the Court there say, that if the facts had been set forth the Judge of the Superior Court, and he alone, must have decided on them. In the subsequent case of the *State v. Seaborn,* 15 N. C., 305, on the affidavit of the prisoner, his case was removed from Wake to Cumberland County, where he was tried and convicted. In this Court it was moved in arrest of judgment, on the ground that his case was improperly moved from Wake, the affidavit not stating the belief of the prisoner that he could not obtain justice in Wake County. The judgment was not arrested, but the authority of *Twitty's case* was doubted. For if one Judge removes a case to another county on an affidavit which he deems sufficient, and the Judge of the other county refuses to try and disclaims the jurisdiction because he thinks the affidavit insufficient in law, or if he thinks the affidavit sufficient and exercises jurisdiction, but this Court, on appeal, arrests judgment because of the insufficiency of the affidavit, as was done in *Twitty's case,* it is at once seen what confusion and uncertainty would involve the administration of justice. Therefore, in *Seaborn's case* it is said by the Court that "it seems indispensa-

ble that there should be a plain and certain method for the Court to which a cause is removed, to determine whether it is bound to try it, that is, has the power to do so, about which, if it stands on the force of the order, the minds of any two Judges may come to different conclusions of fact." The rule there declared is that this Court will look into the affidavit to see whether the facts on which the applicant founds his belief are stated; if the facts are stated, this Court can go no further, for the Judge to whom the application is made, and he alone, decides on their sufficiency. It follows, according to these cases, that if no facts are stated in the affi-
(352) davit the Court has no power to remove, but if the facts are stated the Court is to decide on their sufficiency, and, in its discretion, grant or refuse the application. But this rule is not altogether satisfactory as furnishing an unerring guide to the courts, for one Judge might differ from another as to whether the facts are stated or sufficiently stated, and so take or refuse to take jurisdiction of a case removed to his circuit for trial. It cannot be held, for instance, that a removal without affidavit would confer jurisdiction upon the Court of another county; a trial in the latter upon such a removal would be a nullity according to the cases we have cited.

Nor, on the other hand, ought it to be held that a mere defective statement of the causes for removal in the affidavit makes the removal void, and as conferring no jurisdiction to try. It might, however, be inferred from *Seaborn's case* that such defective statement would be fatal, for the decision in that case is put upon the express ground "that the affidavit comes up, in this respect, to the statutes." Doubtless, the most infallible rule would be to make the order of removal conclusive in all courts, but this cannot be done without violating the plain words of the act and the decisions of this Court. The act authorizing the removal creates a new and special jurisdiction, and before that jurisdiction can be required, the conditions precedent must be complied with, and to that extent the power of removal is not a matter of discretion. But where the facts whereon the belief is founded are set forth in the affidavit, so that, in the language of the act, "the *Judge* may *decide* upon such facts, whether the belief is well grounded," then the Judge acquires complete jurisdic-

tion and his decision is final, and not the subject of review. It was so held by this Court in the later cases of the *State v. Duncan,* 28 N. C., 98, and in *State v. Hildreth,* 31 N. C., 429, and to that extent the question may be considered at rest.

In the case before us the facts are sufficiently stated, and therefore the action of the Judge was final, and would have been so had he ordered the removal as prayed for, instead of denying the motion. It will be observed (353) that the statute does not impose a duty, but confers a discretion, and therefore it is always competent for the Court to refuse to remove. In the exercise of the power of removal this Court has inculcated a spirit of great liberality in favor of life, and that it ought to be a very clear case of demerit in the application to justify the Judge in refusing to allow at least the first removal. The administration of criminal justice must not only be impartial in fact, but the subjects of it should have the best reason to believe they have had a fair trial. We have no reason to believe that the law has not been fairly administered in this case.

5. The question of severance in the trial is a matter of discretion with the Judge, and from his decision there is no appeal. *State v. Collins,* 70 N. C., 241; *State v. Hildreth,* 31 N. C., 429.

There is no error in the record.

PER CURIAM. Judgment affirmed.

Cited: S. v. Hall, 73 N. C., 137; *S. v. Lindsey,* 78 N. C., 501; *S. v. Johnson,* 104 N. C., 784; *Albertson v. Terry,* 109 N. C., 9; *S. v. Finley,* 118 N. C., 1170; *S. v. Smarr,* 121 N. C., 671.

D. D. DURHAM v. W. H. BOSTICK and WILLIAM MARTIN.

In an action of ejectment the plaintiff claimed under a sheriff's deed, and the defendant alleged that the land so sold was exempt from execution as a homestead, and that the sale by the Sheriff was therefore void; and it appearing on the trial that the land was sold for the payment of the purchase money: *Held*, that although there was no evidence of record that such was the fact, yet as the Sheriff took the responsibility of acting on his own conviction, and as his conclusion was right, the sale is not void.

(*Cansler v. Fite*, 50 N. C., 424, cited and approved).

EJECTMENT, tried before *Schenck, J.*, at Fall Term, 1874, CLEVELAND.

This action was brought against W. H. Bostick and Hill Hammick at Spring Term, 1873, and at Fall Term
(354) William Martin was allowed to defend as landlord of Hill Hammick. Hammick had been in possession of said land since 1869. The land in dispute originally belonged to D. D. Durham, and was conveyed to Bostick in 1862 or 1863.

The plaintiff claims title to said land under a sheriff's deed, made 9 April, 1872, in pursuance of an execution against W. H. Bostick in favor of Eliza Webber, executrix.

The judgment was taken in favor of A. A. McAffee, who died in February, 1871. The record shows the will of McAffee, and the appointment of Eliza Webber as his executrix, and her qualification as such.

The Sheriff's deed for the land was registered in July, 1872.

The plaintiff introduced evidence to show that the judgment against Bostick in favor of McAffee was obtained on a note or obligation given by Bostick to D. D. Durham in payment for the land in dispute, and assigned to A. A. McAffee by Durham.

The defendant Martin claimed title to a part of the land, called the "Chestnut Log tract," under a deed from W. H. Green to William Martin, dated 5 October, 1872, and registered after the commencement of this suit.

W. H. Green had a deed for this part of the land made by Bostick on 15 March, 1869, and registered since the commencement of this action.

Both of these deeds were registered on the same day by acknowledgment, and were not witnessed.

The defendant W. H. Bostick claimed title to a part of the land in dispute, known as the D. D. Durham home place, as a homestead, laid off under the statute.

The petition to the magistrate to appoint commissioners for this purpose was dated 15 March, 1869, and their proceedings were registered 27 March, 1869. There was no evidence that the provision of the act requiring six months' notice had been complied with.

The plaintiff introduced evidence to show that the deed from Bostick to Green was made to defraud Bostick's creditors and that Martin had notice of the fraud when he purchased. For the purpose of showing fraud in (355) the title from Bostick to Green, he proposed to prove the declarations of Green made after Bostick had conveyed the "Chestnut Log tract" to him and while he was claiming possession, and before Green had conveyed to Martin.

The declarations were that Green said he had bought both the "Chestnut Log" place and the home place from Bostick, and taken separate deeds for the same; that afterwards Bostick found out that he could keep the home place under the homestead law, and he (Green) surrendered the deed.

The defendant objected, but the objection was overruled by the Court.

The plaintiff introduced evidence to show that Martin, at the time that Green conveyed the "Chestnut Log" place to him, had notice of the fraud and of the plaintiff's purchase at the Sheriff's sale.

The plaintiff offered in support of his title the execution and Sheriff's deed. The defendant objected to the execution because it was on a judgment of A. A. McAffee, who was dead, and contended that the Sheriff's sale under the execution passed no title.

The Court overruled the objection.

The defendant offered evidence to show that the deed from Bostick to Green was not fraudulent, and that Martin had no notice of such fraud if there was any.

The defendant also offered evidence to show that the obligation on which the McAffee judgment was taken was not

given for the land in dispute, but for an entirely different consideration.

After the issues were framed and the jury impaneled the defendant asked to have this issue submitted: Did the two tracts of land join?

The Court refused on the ground that this issue was not raised by the pleadings.

(356) It was in evidence that the lands did not join, but were very nearly adjoining.

The following issues were submitted to the jury, and decided respectively as follows:

1. Is the deed from Bostick to Green for the "Chestnut Log" place fraudulent as to creditors? It is.

2. If it was made to defraud creditors, did Martin have notice of the fraud when he purchased it? He did.

3. Under whom was Bostick holding on 9 April, 1872? W. H. Bostick.

4. Under whom was he holding in October, 1872? Durham.

5. What was the note given for, which was sued on? Land.

6. What land? A balance on the D. D. Durham tract of land, and the "Chestnut Log tract."

Upon the finding of the jury, judgment was given for the plaintiff, and thereupon the defendant appealed.

Shipp & Bailey, for appellant.
J. F. Hoke and *Battle & Son, contra.*

PEARSON, C. J. Mr. Bailey, for the appellant, made *seven points*, and it is necessary to dispose of them separately.

The purpose of an argument at bar is to have both sides presented, and to aid the Court in coming to a conclusion, by showing what can be said on the two sides. This purpose of *"aiding the Court"* requires an attorney to abandon all points made in the hurry of the circuit which, upon more consideration, he finds not to be tenable, so as to devote his argument to the main points of the case, without causing a diversion of the mind of the Court to matters of minor importance.

1. The execution issued within *less than three years* after the rendition of the judgment.

2. The executrix was authorized to sue out execution and judgment obtained by the testator. Bat. Rev., ch. 45, sec. 135.

3. The objection for a misjoinder of action on the ground that the two tracts of land did not adjoin, must be taken advantage of by demurrer, if the error appears (357) on the face of the record; otherwise, it must be relied on by the answer. C. C. P., secs. 98, 99.

4. The declarations of Green while *owning the land* and claiming the possession, are evidence against the defendant, who claims under him. *Cansler v. Fite,* 50 N. C., 424.

5. That is the main point in the case, and rests on the ground that the validity of the homestead cannot be impeached in a collateral way, and it must be established in some direct proceeding that the judgment on which the execution issued, and the homestead was sold, was rendered for the purchase money of the land, otherwise the Sheriff has no power to sell and is liable to indictment for so doing.

The Constitution, Art. V, sec. 2, "Homestead and Exemptions," provides: "No property shall be exempt from sale for taxes or for the payment of obligations contracted for the purchase of the premises." The jury find that the debt on which the judgment was rendered was an obligation for the purchase of the land covered by the homestead, so it is clear that the land was liable to sale under the execution.

As there was no record evidence of this fact, it may be that the Sheriff would have been justified in refusing to take upon himself the responsibility of deciding the fact, and was not obliged to sell until the creditor should establish the fact in some direct proceeding for that purpose.

But, in this case, the Sheriff took the responsibility of acting upon his own conviction as to the fact, and as his conclusion was right, as found by the jury, and the homestead was in fact liable to be sold, there is no principle upon which his sale can be held to be void; he had power to sell and elected to exercise it.

As, however, the Sheriff would have been justified in refusing to sell, that fact suggests the policy of providing by statute, in order to meet exigency of all like cases, that the creditor may allege in his complaint that the debt sued for is "an obligation contracted for the purchase of the premises," and

(358) in case the allegation be admitted or found by the jury, the fact shall be set out in the judgment, and shall be noted upon the execution, as in case of a security, who is allowed to have the fact found and noted on the execution for the guidance of the Sheriff.

In the meantime, and without a statute to that effect, if the allegation be made in the complaint and is admitted by the answer, or, being denied, is found by the jury, the Superior Court Judges in furtherance of the administration of the law, according to the provisions of the Constitution, will, no doubt, allow that fact to be set out in the record, so that it may be noted upon the execution, and thereby relieve the Sheriff from responsibility, and enable the plaintiff to get pay for his land, without any circuitous proceeding which the refusal of the Sheriff to sell might make necessary, in order to enforce payment. The other points need not be noted, except to say that it does not appear that the defendant had a wife.

PER CURIAM. Affirmed.

Cited: Toms v. Fite, 93 N. C., 275; *McCanless v. Flinchum,* 98 N. C., 365; *McCracken v. Adler, Id.,* 402; *Mining Co. v. Smelting Co.,* 99 N. C., 463; *Durham v. Wilson,* 104 N. C., 597; *Loyd v. Loyd,* 113 N. C., 189.

STATE v. JOSEPH BUCKLEY.

1. It would be a serious obstruction to the administration of justice if transcripts sent from one court to another, sometimes loosely made up, could not be amended by the original records. The courts have authority so to amend in order to make such transcript conform to the original record.

2. Upon a trial of larceny it is competent for the State to show the condition of the prosecutor at the time of the alleged larceny, and for some time thereafter, in order to prove that he had been drugged, as well as the potent effects of the drug administered.

(*State v. Upton,* 12 N. C., 513, and *State v. Jackson,* 65 N. C., 305, cited and approved).

INDICTMENT FOR LARCENY, tried before *Schenck, J.,* at Fall Term, 1874, CABARRUS.

The larceny was alleged to have been committed in (359) an alley leading from the Charlotte hotel to a livery-stable in the rear of the lot, at the end of an omnibus, which stood near a shed.

One Whitlock, keeper of the stables, testified that he was at the stable and saw the defendant Buckley, and Boyd, from whom the money was stolen, coming down the alley, arm and arm, early in the morning; also four other men whom he did not know, following close after them. Defendant said to Boyd: "Your name is Boyd and mine is Boyd; let's take a drink." Boyd then drank out of a bottle of Buckley's and very soon became "as limber as a dish-rag, and seemed to lose his senses." At that time Buckley, Boyd, and the four men were at the step of the omnibus. One of the men, "a little Irishman," pretending to be very drunk, pulled out some cards and threw them down on the omnibus step, and all the men said to Boyd, "Bet, bet." Boyd replied, "I never do bet," and refused to bet. Just then one of the party—witness could not say which, as they were all close together—put his hand into Boyd's left-hand pants-pocket. Boyd clasped his hand on the pocket and said, "Don't take my money," but the man did take it.

Witness, attracted by this conversation, gave better attention and came nearer to them. The man with "white pants" had the money, and counted it out, $75, and handed it to one of the others, who immediately made off with it. They were all strangers, and witness had not seen them since.

As soon as the money was taken the party scattered, and Buckley led the old man Boyd back to the stable. Boyd was complaining, and Buckley said: "Hush, we'll fix those fellows." Witness followed to the hotel and found two of the men paying their bills and getting ready to leave.

Boyd was senseless and helpless and was lifted by the porter and put in a chair, from which he was lifted into an omnibus and carried to the depot. Witness had brought the four men from Monroe after Robinson's circus was there. Defendant came there from some other place. Witness described the money as "greenbacks," and no point was made as to the identity. One ten-dollar bill was particularly (360) described as a new bill. This occurred just before the northern train was to leave on the North Carolina Railroad.

Witness was asked by the Solicitor "if he saw Boyd after this at the Mayor's office, and on the hearing of the *habeas corpus* a day or two afterwards, and what was his condition?" Defendant objected. The objection was overruled by the Court, and prisoner excepted. Witness then stated that he saw Boyd at the Mayor's office that day, and he was unable to testify. That he saw him two days afterwards at the court-house; that he was "drowsy, stupid, and talked like he was not in his right mind, but was better than when at the Mayor's office."

Prisoner requested the Court, among other things, to charge the jury "that if it was the purpose of the defendant to induce Boyd to bet the money at cards, then in such case he is not guilty of larceny."

Prisoner further requested the Court to instruct the jury "that to constitute larceny the felonious taking must be done fraudulently and secretly, so as not only to deprive Boyd of his property, but also to leave him without knowledge of the taker."

His Honor refused the specific instruction asked for and charged the jury that the intention with which the taking was done had been fairly left to the jury. As to the second charge asked for, his Honor declined to give it in that language, on the ground that the word "secretly" might mislead them, but charged "that larceny might be committed without secrecy in one sense, as in *Henderson's case,* or it might be done in daylight or in a crowd; that it must, however, be fraudulently done; that this was indispensable to the commission of larceny. That the leading idea in larceny was an attempt to evade the law."

The jury rendered a verdict of "Guilty." There was a motion for a new trial; motion overruled.

Motion in arrest of judgment because the seal of the (361) Court was not attached.

Motion was overruled, judgment pronounced, and the prisoner appealed.

Wilson & Son, for the prisoner.
Attorney-General Hargrove, for the State.

SETTLE, J. We answer the objection of the defendant to the amendment of the record, in the language of this Court in *State v. Upton,* 12 N. C., 513: "It would be a serious obstruction to the administration of justice if transcripts sent from one court to another, sometimes loosely made up, could not be amended by the original record. It is every-day practice to do so, and it is consistent with principle." Of course, it can make no difference at what time during the term the amendment is made.

The defendant has no just ground of complaint, either to the charge or the rulings of his Honor.

In *State v. Jackson,* 65 N. C., 305, the defendant took advantage of the drunken condition of the prosecutor to abstract his money from his person. Here the defendant first administered drugged liquor, which had the effect almost immediately to make the prosecutor, in the language of the witness, "as limber as a dish-rag," and then took his money.

We think it was clearly competent to show the condition of the prosecutor for some time thereafter, to establish:

1. The fact that he had been drugged.
2. To show the potency of the drug administered.

The record states that no point was made as to the identity of the money, and indeed it would have been useless to have made the point after the voluntary confession of the defendant to the officer that he had taken the prosecutor's money, and would return it rather than go to jail.

PER CURIAM. No error.

(362)

HENRY D. PONTON and wife and others v. GRIFFIN BROS. & CO., D. PENDER and others.

A debt may be verbally assigned; and the assignment, if made for a valuable consideration, will hold good against the lien of an attachment subsequently obtained.

ACTION, tried at December (Special) Term, 1873, of HALIFAX, before *Moore, J.*

I. This was a controversy between some of the defendants in the principal cause, to-wit: D. Pender, a North Carolina creditor of the firm of Griffin Brothers & Co., of Baltimore, in the State of Maryland, on the one part, and William Bayne & Co. and Randolph Barton and W. B. Brooks, assignees in bankruptcy of Kirkland, Chase & Co., Maryland creditors of the said firm of Griffin Brothers & Co., on the other part—each of said claimants demanding to have a fund, arising in the principal cause, amounting to about $2,700, and apparently belonging to Griffin Brothers & Co., applied to the satisfaction of their respective debts.

II. D. Pender claimed by virtue of an attachment, the lien of which was of the date of 13 November, 1872; the other claimants did not dispute the *validity* and regularity of said attachment and of the lien acquired thereunder, but alleged that before the said lien attached, the fund in controversy, or the debt which it represented, had been assigned to them by Griffin Brothers & Co., by a contract entered into within the State of Maryland, in part satisfaction and discharge of their respective claims against Griffin Brothers & Co.

III. William Bayne & Co. and the assignees in bankruptcy of Kirkland, Chase & Co. claimed by virtue of an oral assignment alleged to have been made to them in Maryland, before 5 March, 1870, by W. H. Griffin, as trustee and closing partner of the firm of Griffin Brothers & Co., in part payment of the latter firm's indebtedness to them, the said claimants, of the debt due by W. J. Eppes, of North Carolina, to

(363) said Griffin Brothers & Co., secured by a deed of trust of land in Halifax County, North Carolina, made by said Eppes to said W. H. Griffin, to satisfy which last aforesaid debt the aforesaid fund of $2,700, or thereabouts, was

held by the Superior Court of Halifax County, being part of the proceeds of the sale of said land, which land had been sold by an order of the Court, on 5 December, 1872.

IV. D. Pender denied that any such assignment had ever been made before his lien attached to the fund, and further insisted that if such assignment had been made it was merely equitable and could not defeat the effect of his lien by attachment.

V. The following issues of fact were thereupon submitted by the Court to a jury for a verdict thereon:

1. Was the paper-writing marked "A," referred to in answer of Kirkland, Chase & Co., and others, executed?

2. When was said paper-writing actually signed?

3. What was it given for?

4. Was there a verbal assignment by Griffin Brothers & Co., or by W. H. Griffin as closing partner on behalf of said firm, of the debt secured by mortgage of Eppes, set out in the pleadings, to William Bayne & Co. and Kirkland, Chase & Co. for a valuable consideration, prior to the attachment of D. Pender?

VI. On the trial of said issues William Bayne & Co. and the assignees in bankruptcy of Kirkland, Chase & Co. were plaintiffs and D. Pender was defendant.

VII. The only witness offered by the plaintiffs to prove said assignment was one Allen Chapman, who testified that in the year 1868, 1869 or 1870, he was a member of the firm of Kirkland, Chase & Co.; that Griffin Brothers & Co. were indebted to his firm in the sum of ten or twelve thousand dollars; that W. H. Griffin was the active partner of the concern; that the witness never knew personally any of the others; that in the fall of 1868 Griffin Brothers & Co. compromised their debts at fifty cents in the dollar, for which they gave two sets of notes: the first set they paid, the second (364) they failed to pay; that W. H. Griffin then came to witness and told him that he had a debt secured by mortgage in North Carolina, and offered to give this debt, which offer was accepted by him for the creditors, in part payment; that the assignment hereinbefore referred to was signed by W. H. Griffin before 5 March, 1870; that witness never saw it signed, and did not recognize the handwriting on the stamp;

that the verbal agreement to transfer or assign the Eppes debt and mortgage was made in 1869, in Baltimore, in the State of Maryland; that he first saw the assignment about six months afterwards.

VIII. The only witness offered by the defendant was one R. D. Pender, who testified that Mr. Bayne of the firm of William Bayne & Co. recently told him that the transfer or assignment of the Eppes debt, secured by mortgage, and testified to by the witness Chapman, was held by them as a collateral.

IX. Before submitting the case to the jury the plaintiffs abandoned all claim under any *written* assignment, but insisted there had been a valid oral assignment of the Eppes debt to them before the lien of the plaintiffs' attachment attached thereto, on 13 November, 1872, which verbal assignment was of sufficient force, vigor and validity to defeat the claim of the defendant under the lien of his attachment.

X. D. Pender's counsel prayed his Honor to instruct the jury that if at the time the assignment was made to Kirkland, Chase & Co. and others, they did not release part of the debt due to them by Griffin Brothers & Co., or acknowledge its satisfaction or otherwise discharge it, the assignment was a mortgage or deed of trust of the chose in action (*i. e.,* the interest of Griffin Brothers & Co. in the Eppes deed of trust, etc.), and was void as against D. Pender for want of registration. This prayer his Honor granted, and instructed the jury that if the assignment was a mortgage, it required registration.

XI. Pender, by his counsel, further prayed his Honor to instruct the jury that the alleged assignment was void as against him for fraud, because it did not upon its
(365) face express its true character as a mortgage or collateral security for an existing debt. This prayer his Honor refused to grant, but instructed the jury that the assignment relied on by William Bayne & Co. and others was the verbal assignment made prior to 5 March, 1870, and not the paper-writing of which it was a copy. To which charge of his Honor as made, and refusal of his Honor to charge as prayed, the said D. Pender excepted.

XII. Pender further prayed his Honor to instruct the jury that if the understanding between Griffin Brothers & Co. and William Bayne & Co. and others, at the time of the

assignment, was that the latter were to take the debt and interest under the mortgage assigned and apply the net proceeds when realized, whatever they might be, to the credit of the debt due by Griffin Brothers & Co. to them, then the said assignment was a mortgage, or deed of trust, or collateral security, for an existing debt. This prayer his Honor granted.

XIII. Pender further insisted before his Honor that, admitting the truth of all the evidence of an oral assignment offered by the said William Bayne & Co. and the assignees in bankruptcy of Kirkland, Chase & Co., in its utmost extent, it only proved an equitable assignment of the Eppes debt in payment and satisfaction of the debts of Griffin Brothers & Co. to William Bayne & Co. and Kirkland, Chase & Co., and not a legal assignment of the debt; and that such equitable assignment had not sufficient force, vigor and validity to defeat the lien of his attachment; and that, moreover, such an assignment made in Maryland to secure a creditor in Maryland, even if made before the Eppes debt, was bound by the lien of the attachment of D. Pender, a North Carolina creditor, and would not be held valid by a North Carolina court when the effect of such validity would be to defeat the claim of the North Carolina creditor under a lien given by North Carolina law and process, and recognized by said Court, and that, at all events, to make this assignment valid as against D. Pender, it must have been in *writing*.

XIV. His Honor charged the jury, in substance, (366) that if W. H. Griffin turned over *verbally* to the plaintiffs the interest of Griffin Brothers & Co. in the Eppes debt, and in the mortgage to secure the same, and in the land in Halifax County, North Carolina, embraced therein, it was a good assignment; and if done prior to the attachment of Pender, valid against him; that it was not necessary that the transfer should have been in writing, and that though Mr. Bayne of William Bayne & Co. did tell the witness Pender that the interest or debt assigned to them was transferred as a collateral security for their claim against Griffin Brothers & Co., that it did not make it so; that Mr. Bayne might have thought that it had been transferred as a collateral, when in fact it was transferred as an absolute payment and discharge of their claim against Griffin Brothers & Co. That they

must consider the whole evidence, and find as a fact whether it was received as a collateral or as a payment. His Honor then explained to the jury the difference. No exception was taken. To which instructions to the jury as given, the said Pender by his counsel then and there excepted.

XV. And thereupon the jury found "that there was a verbal assignment of the interest in controversy, made prior to the attachment of Pender, to said William Bayne & Co. and Kirkland, Chase & Co. for valuable consideration, and it was in part payment of debts due said firms, and not as a collateral security," and no more. And thereupon his Honor gave judgment, directing the fund of $2,700 or thereabouts to be paid to the said William Bayne & Co. and the assignees in bankruptcy of Kirkland, Chase & Co.

XVII. And the said D. Pender, in addition to the exceptions hereinbefore in this case set out, and which are hereby assigned for errors in the Superior Court of Halifax County, makes the following additional assignment of errors, to-wit:

1. That the finding of the jury was not responsive to *all* the issues submitted to them.

2. That the finding of the jury *embraced matters not submitted to them* in the issues.

(367) 3. That notwithstanding the finding of the jury, his Honor ought to have pronounced judgment ordering the debt of the said D. Pender to be paid out of the said fund of $2,700 or thereabouts.

From which judgment the defendant Pender and others appealed.

Smith & Strong and *Walter Clark,* for appellants.
Haywood, Busbee & Busbee and *Bridgers, contra.*

RODMAN, J. It is to be regretted that counsel who represent appellants do not in all cases strictly pursue the provisions of The Code for settling cases on appeal. It will probably be found necessary to dismiss, on motion of the appellee, every appeal where the case is not settled as prescribed, or agreed on by the parties.

The result of a neglect of the prescribed forms of proceeding in the present case is that the Judge was called on to

settle the case so long after the trial that, as he says, the incidents of it had faded from his recollection, and counsel on the different sides are unable to agree as to what occurred.

The case to which the Judge gives a qualified and reluctant approval, although quite long, yet almost evidently fails to state with fullness and precision the instructions of the Judge to the jury on what seems to be the only contested question in the action.

It seems to be admitted that the attachment of Pender created a lien on the debt from Eppes to Griffin Brothers & Co., *provided* that debt had not been previously assigned in some valid way to William Bayne & Co. and to Kirkland, Chase & Co.

The only evidence as to such assignment was that given by one Chapman, who said that in 1868, 1869 or 1870 he was a member of the firm of Kirkland, Chase & Co., in Baltimore, and that Griffin Brothers & Co., being indebted to them in 1869, verbally agreed to assign to them the Eppes debt in part payment. He does not say that any assignment was actually made, either verbally or otherwise, but merely that Griffin offered to assign, and that his offer was (368) accepted. It is consistent with his evidence that there was merely an executory agreement to assign. Chapman does not state whether the note of Eppes was delivered to him, or whether Griffin was credited with its value as a payment on his debt, or explain why it was that an assignment of this debt as a collateral security was afterwards made and accepted.

The Judge instructed the jury that "If W. H. Griffin turned over *verbally* to the plaintiffs" (meaning thereby, as we suppose, Kirkland, Chase & Co. and William Bayne & Co.) "the interest of Griffin Brothers & Co. in the Eppes debt, etc., it was a good assignment, and if done prior to the attachment of Pender, valid against him; that it was not necessary that the transfer should have been in writing; and that though Mr. Bayne of William Bayne & Co. did tell the witness Pender that the interest or debt assigned to them was transferred as a collateral security for their claim against Griffin Brothers & Co., that did not make it so; that Mr. Bayne might have thought that it had been transferred as a collateral, when in fact it was transferred as an absolute pay-

ment and discharge of their claim against Griffin Brothers & Co. That they must consider the whole evidence and find as a fact whether it was received as a collateral or as a payment."

His Honor then explained to the jury the difference between a collateral and a payment, to which no exception was taken.

The jury found that there was a verbal assignment of the Eppes debt to William Bayne & Co. and to Kirkland, Chase & Co., for a valuable consideration, before the attachment of Pender.

On this verdict the Judge directed payment of the fund to William Bayne & Co. and to Kirkland, Chase & Co., and Pender appealed.

The brief filed by the counsel for Pender seems manifestly to have been drawn in reference to a different state of facts and to different questions from those which we have before us.

We perceive no positive error in the instructions of the Judge. A debt may be verbally assigned. We know (369) that it is done daily. The evidence that the debt was here in fact assigned seems weak, but it cannot be said there was *no* evidence of an executed assignment for value.

PER CURIAM. Affirmed.

Cited: Pender v. Griffin, ante, 272; *Lawson v. Pringle,* 98 N. C., 454; *Munds v. Cassidy, Id.,* 565; *Rice v. Jones,* 103 N. C., 233; *Brem v. Covington,* 104 N. C., 594; *Chemical Co. v. McNair,* 139 N. C., 333.

JOB ALLEN and GEORGE W. REID v. WILLIAM SPOON and others.

A sheriff is not entitled to any extra compensation for executing a "writ of ejectment," or a "writ of possession." Sec. 21, ch. 105, subdiv. 14, Bat. Rev., does not apply to such cases.

MOTION in the cause, that extra compensation be allowed the Sheriff over and above his taxed costs, heard by *Tourgee, J.*, at Spring Term, 1874, of RANDOLPH.

The plaintiffs heretofore had brought an action in the Superior Court of Randolph against the defendants to recover the possession of a certain tract of land in said county, and had obtained a judgment, upon which a writ of possession issued, which came to the hands of the Sheriff of Randolph, and under which he turned the defendants out and put the plaintiff in possession of the premises recovered.

The Sheriff brought up an account for the sum of $113.35 for executing said writ and removing the defendants' property from the premises to a house about a half mile distant, which was as convenient as any other house to the premises, where a daughter of defendant Spoon resided, and asked the Judge to allow the same and make an order for its payment by defendants as part of the costs.

His Honor being of opinion that the Sheriff was (370) entitled to said account for his services in executing said writ, made an order for its payment by defendants; with which ruling the defendants, being dissatisfied, excepted, for the reason that the law fixes the fees of the Sheriff in all such cases, and the Judge had no authority in law to make such order, and appealed.

Gorrell, for appellants.
Mendenhall & Staples and *Shipp & Bailey, contra.*

PEARSON, C. J. It is seemingly a hard measure that a sheriff should be out of pocket $113 as the price for learning how to execute "a writ of ejectment," or, as we used to call it, "a writ of possession." But we can see no ground on which the Judge of a Superior Court can come to the relief of the Sheriff and by an order in the case require the de-

fendant to pay for the *officious* acts of the Sheriff, although the defendant had the benefit thereof.

It is a safe rule for ministerial officers to be governed by the words of the writ: "We command you, that without delay you cause the said Reid and Allen to have possession," etc. In order to do this it was necessary for the Sheriff to put Spoon out of possession, and if he refused to go, compel him by the *posse comitatus.*

The usual mode of proceeding when, as in this case, the defendant has much chattel property, is for the Sheriff to notify him that on a day certain he will "eject him and put the plaintiff into possession," thus giving the defendant reasonable time to have his chattels removed by his own wagon and team, with his wife and children to help, at a less expense than the Sheriff could afford to do it.

The only question is, Does any statute allowing fees to sheriffs cover the case? Ch. 105, Bat. Rev., sec. 21, subdiv. 14, does not apply: "seizing specific property under order of a court or executing any other order of a court or Judge not specially provided for, to be allowed by the Judge." Here there was no "seizing of specific property under an
(371) order of the Court"; that has reference to attachments and seizing under a summons for "claim and delivery," and the general words, "or executing any other order of a court or Judge not specially provided for," cannot embrace executing a writ of ejectment, for that is specially provided for. Subdiv. 26. "Service of writ of ejectment, one dollar," to say nothing of the incongruity of treating the writ of ejectment or writ of possession, which is the final process in all demands for the possession of land, as an order of a court or Judge not specially provided for.

PER CURIAM. Judgment reversed.

ALFRED PALMER v. R. T. BOSHER and F. C. CLARK.

When the defendant in attachment moves to vacate the same for causes appearing in his affidavit, it is not necessary to serve the plaintiff with a copy of such affidavit before the motion is heard.

MOTION, upon notice filed, to amend affidavits for an attachment, and also a motion by defendants to vacate an attachment, heard before *Henry, J.,* at Fall Term, 1874, WAKE.

The motion to allow the plaintiff to amend his affidavit was granted by the Court.

The counsel for the defendants then moved upon affidavits to vacate the attachment. The counsel for the plaintiff said in the course of his argument that he was taken by surprise, not anticipating the defendants' affidavits, and that if he had time he could probably produce numbers of affidavits to refute the affidavits of the defendants. He did not move to file counter-affidavits, nor did he ask for time in which to prepare and file them. No motion was made to the Court.

The motion to vacate the attachment was granted, and (372) the plaintiff appealed.

Jones & Jones, for appellant.
Busbee & Busbee, contra.

SETTLE, J. No error appears to this Court in the order vacating the warrant of attachment. Indeed, upon the affidavits filed by the defendants, it is not seen that his Honor could have done otherwise.

The plaintiff's counsel says that he was taken by surprise, and that the defendants should have served him with copies of their affidavits at the same time they served notice of their motion to vacate the warrant of attachment. We cannot assent to that proposition. Such a requirement would be impracticable. The counsel did not then propose to file counter-affidavits, nor did he ask for time to prepare and file them, nor did he state positively that he could contradict the affidavits filed by the defendants; but only said "if he had time, he could *probably* produce numbers of affidavits to refute the affidavits filed by the defendants."

PER CURIAM. Judgment affirmed.

A. G. HUNSUCKER v. JOHN FARMER and WM. P. FARMER.

The declarations of a lessee (not a party to the action) concerning the lease, and the transactions between himself and the defendant, are not admissible in evidence in an action between such defendant and a third party, in which a counter-claim is set up growing out of an assignment of the lease.

ACTION, commencing in a Justice's Court, and carried by appeal to the Superior Court of CHEROKEE, and there tried before *Cannon, J.*, at Fall Term, 1874.

The complaint of the plaintiff is founded on a bond (373) executed by the defendants for a certain tract of land.

In the answer the defendants set up a counter-claim, growing out of a lease to one Bates and the alleged assignment of that lease to the defendants for rents due thereunder, after the sale of the land to them by the plaintiff.

On the trial below several questions arose and were decided by the Court, which, not being considered in this Court, it is unnecessary to notice.

The case states that the defendants offered to prove the declarations of Bates, the lessee, concerning the lease and the transaction between him and defendants, after the sale of the land and while Bates was in possession under the lease, for the purpose of showing they had used due diligence in endeavoring to collect the rents. This in reply to the position of the plaintiff, that at best he was only a guarantor. The plaintiff objected to this evidence, but it was received by his Honor, whereupon plaintiff excepted.

There was a verdict and judgment for the defendants.

Plaintiff appealed.

Battle & Son, for appellant.
A. T. & T. F. Davidson, contra.

READE, J. The rule is that the declarations of a third person are but hearsay, and not evidence. The person himself ought to be introduced as a witness. There are some exceptions to this rule, but there is nothing to bring the declaration of Bates within the exceptions. They were offered to prove a "transaction," and that the defendant had used "due diligence" in endeavoring to collect a debt which plaintiff alleged he was bound for, if at all, only as guarantor.

As this error entitles the plaintiff to a new trial, it is not necessary to decide other points raised, as they will probably be avoided on the next trial.

PER CURIAM. *Venire de novo.*

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(374)

SAMUEL B. COBB, exr. of THOMAS L. SLADE, v. L. B. HENDERSON and others.

A testator devised to his widow for life certain lands, and directed the same to be sold after her death and the proceeds divided, with certain limitations, among his children, to one of whom, Thomas, he had given a tract of land for life, with limitation to his wife, etc.: *Held*, that Thomas took only a life estate in the proceeds of the sale of his father's land, and that the land devised to him for life, etc., is liable to be sold to repay such proceeds to the parties entitled.

SPECIAL PROCEEDING to subject certain lands to sale for assets, heard before *Kerr, J.*, upon an appeal from the Probate Court, at Fall Term of CALDWELL.

The facts pertinent to the point decided in this Court are:

That Nathaniel Slade, the father of the testator of the plaintiff, devised to his widow for life a certain tract of land, which was taken possession of by her, and at her death was sold, and the proceeds of such sale were divided and paid over to the heirs and devisees in remainder of the said Nathaniel, among whom was the testator of the plaintiff, who received one-sixth thereof, amounting to $1,689.17. The testator of the plaintiff, Thomas L. Slade, left his property, by will, to L. B. Henderson and others, the defendants in this action.

It was admitted that there was a necessity to sell a part of the land left by Nathaniel Slade to his son, the plaintiff's testator, to pay his debts, exclusive of the said sum of $1,689.17 received by him from the sale of the land at the death of the widow of the said Nathaniel Slade, as before stated; and the heirs and devisees of the said Nathaniel, on motion, and by consent of parties, were admitted to come in and be made parties. The said heirs and devisees thereupon set up a claim that the estate of the testator of the plaintiff was bound, in law, to return and pay over the said sum of $1,689.17, with

interest from the death of said testator, to-wit, 8 November, 1873, according to the true construction of the will of the said Nathaniel Slade. The plaintiff and the devisees (375) of Thomas L. Slade insist that the said Thomas received the said sum of $1,689.17 as his own absolute property, and that there is no obligation upon his estate to return or pay over said money to the heirs of the said Nathaniel Slade.

By consent the cause was heard upon the complaint and answers and the wills of Nathaniel Slade and Thomas L. Slade, the plaintiff's testator; and after argument the Court adjudged, among other things, that according to the true intent and meaning of the will of Nathaniel Slade, Thomas L. Slade, the testator of the plaintiff, had only a life estate in the said sum of $1,689.17, and that the lands mentioned in the pleadings are liable to be sold to repay the same to the estate of the said Nathaniel Slade for his heirs and devisees.

From this ruling of his Honor the plaintiff and the devisees of Thomas L. Slade appealed to this Court.

The material parts of the will of Nathaniel Slade are in substance as follows:

"*First.* I give to my wife, Elizabeth N. Slade, during her natural life, the following property, to-wit, all of my land except such as may be herein given to my son, Thomas L. Slade; also two of my negroes," and other personal property, describing it.

"*Secondly.* I give to my son, Thomas L. Slade, his administrators and assigns forever, a negro boy by the name of Daniel.

"*Thirdly.* I also give to my son, Thomas L. Slade, the following tract of land, for his life only (subject to the limitations hereinafter expressed)," describing the land, and then adding: "Should Susan, the present wife of my son, Thomas L. Slade, survive him, then my will is that the said Susan, his wife, shall have and enjoy the said land, together with all the property herein given to my son, Thomas L. Slade, for life, so long as she may live and remain his widow, and no longer; and should my son, Thomas L. Slade, hereafter have children, then to each of the said children as may survive him, and to the children of such of his children as may die before he does,

who may survive him, the remainder of all the property herein given to my son, Thomas L. Slade, for life, (376) is devised and bequeathed to them, his, her or their heirs, forever; and should there be more than one such, to be divided as follows, to-wit, among his children equally," etc.

"*Fourthly.* I will and direct that all the residue of my property be equally divided at my death, and at the falling in of the life estate herein created, respectively among my children, except my daughter," etc.

In a codicil the testator directs that he wishes "after the death of my wife, that my land be sold and the money equally divided among my children in the same manner that the other property is herein directed."

Dillard & Gilmer and *Graham & Graham,* for appellants.
Watts & Withers and *Bailey, contra.*

READE, J. There is only a single question: Whether Thomas L. Slade, plaintiff's testator, took an absolute or only a life estate. His Honor was of the opinion that he took only a life estate, and we are of the same opinion. Such is the language and such seems to be the intention of the will.

PER CURIAM. Judgment affirmed.

STATE v. WILLIAM WILKERSON.

Where A was indicted for stealing a hog, and on the trial it was shown that a hog belonging to the prosecutor had been killed and concealed in the corner of the fence, covered with leaves; and that A was seen at night to go to the place and look carefully around, and stoop over as if about to take the hog, and upon being hailed, fled: *Held,* that these facts alone would not justify a verdict of guilty.

INDICTMENT FOR LARCENY, tried before *Henry, J.,* at Fall Term, 1874, GRANVILLE.

The defendant was indicted for stealing a hog, the (377) property of one Lowell Thorp. It was in evidence that on the morning of the day on which the alleged larceny was committed, one Royster, a witness in the case, was passing

through a skirt of woods and saw Lowell Thorp feeding his hogs. That on the evening of the same day said Royster returned and saw a dead hog in a corner of the fence. The witness identified the hog as the property of Lowell Thorp. The dead hog was covered with leaves. Royster informed Thorp that one of his hogs was dead, and also where it was. Thorp borrowed a gun from Royster and went off.

Lowell Thorp testified that in consequence of what he had been told by Royster, he borrowed a gun from him and stationed himself near the corner of the fence where the dead hog was; that he waited there until some time in the night, when some one approached, got over the fence and looked around carefully as if looking for some one, and then stooped over, as if to take up the hog; witness then hailed him, and thereupon the person ran off. That he recognized that person as the defendant Bill Wilkerson.

The counsel for the defense contended that the State had failed to prove a larceny, and asked the Court to charge the jury that if they believed the defendant shot the hog and covered it with leaves, he was not guilty.

His Honor refused to charge as requested, but charged the jury that if they believed the defendant shot down the hog and covered it with leaves, with a view to conceal it until he could return and take it away secretly, that there was in law a sufficient asportation, and they must find the defendant guilty. The defendant excepted to this charge.

The jury rendered a verdict of guilty, whereupon the prisoner moved for a new trial. The motion was overruled and sentence pronounced, and the prisoner appealed.

W. H. Young, for defendant.
Attorney-General Hargrove, for the State.

(378) RODMAN, J. The case professes to set out the evidence, which, unexplained, we must take to mean the whole evidence. It was, briefly, that a hog belonging to one Thorp was seen on a certain day lying in the lock of a fence covered with leaves, and that during the night of that day the prisoner got over the fence, looked around carefully as if looking for some one and then stooped over the hog as if to take it up, when Thorp, who was on the watch, hailed him, and he

ran off. The Judge told the jury "that if they believed that the defendant shot down the hog and covered it with leaves with a view to conceal it until such time as he could return to it and take it away secretly, there was in law a sufficient asportation, and they must find the defendant guilty."

The prisoner in his request for instructions assumes, as the Judge does, that there was evidence that he shot down the hog and covered it with leaves. Yet in the case sent to this Court there does not appear any evidence tending to that effect. In the absence of such evidence the Judge clearly erred in assuming the facts. Merely looking in the night-time at a dead hog lying in the lock of the fence and covered with leaves, and running away on being hailed, does not constitute larceny. Probably there was evidence that the prisoner shot the hog and covered it with leaves, but we cannot go out of the case sent up.

PER CURIAM. *Venire de novo.*

Cited: S. v. Christmas, 101 N. C., 757; *S. v. Green,* 117 N. C., 696.

(379)

STATE v. RUFUS GARDNER.

1. A justice of the peace has no jurisdiction to try and determine the offense of assault and battery, unless the provisions of ch. 33, sec. 119, Bat. Rev., have been complied with:

2. *Therefore,* where A was indicted in the Superior Court for an assault and battery committed in the presence of the magistrate, and upon a plea of "former conviction," it appeared that he had been fined by the Justice "for contempt of Court and assault" on the prosecutor: *Held,* that as the provisions of sec. 119 had not been complied with, the facts did not sustain the defendant's plea, and that it was no defense to the indictment in the Superior Court.

(*State v. Johnson,* 64 N. C., 581; *State v. Harris,* 65 N. C., 301, cited and approved).

INDICTMENT for assault and battery, tried before *Watts, J.,* at January Term, 1875, WAKE.

The defendant relied upon the plea of former conviction and punishment.

It was in evidence that the defendant had committed an assault and battery upon one Holland, the prosecutor, in the presence of one L. B. Seagraves, a justice of the peace for the county of Wake. For committing the said offense the defendant was fined by the said justice of the peace for a contempt of court. The record of the magistrate was introduced in evidence and showed that the defendant had been fined for "contempt of court, and assault on William Holland."

The prosecutor swore that he did not make complaint to the magistrate of the injury done, nor request him to take cognizance of the offense.

Upon inspection of the record, his Honor held that the plea of former conviction was not sufficiently shown, and charged the jury that if they believed the evidence they should find the defendant guilty.

The prisoner excepted to this ruling. The jury rendered a verdict of guilty, whereupon the defendant appealed.

(380) *T. M. Argo,* for the defendant.
Attorney-General Hargrove, for the State.

PEARSON, C. J. We concur with his Honor in the view taken by him of this case. The action of the justice of the peace was simply to impose a fine on the defendant for contempt in committing an assault and battery in his presence while trying a case, and did not include a trial, conviction and punishment for the misdemeanor of an assault and battery. The one is an offense against the public peace, and is against the peace and dignity of the State. The other is an offense against the dignity of the office of a justice of the peace, which he is allowed to protect by punishment for contempt. The act of the defendant included these two distinct offenses, and the justice of the peace imposed a fine of one dollar for contempt. It follows that the defendant did not establish his plea of "former conviction and punishment."

If an assault and battery be committed in the room of the Superior Court, while in session, and the Judge imposes a fine on the party or sends him to jail, it would not occur to any one that this could be pleaded in bar of an indictment for assault and battery, for the Judge had no power to convict and

punish for the misdemeanor, except upon a bill of indictment found by a grand jury and passed on by a petit jury; and the action of the Judge will be taken to be a punishment for the contempt only. So in our case, the action of the justice of the peace must be taken to be a punishment for the contempt only. For the Justice had no jurisdiction to try and punish the defendant for the misdemeanor, "unless it shall appear on the complaint and upon proof before him: (1) That the offense was committed within his township; (2) that the complaint is not made by collusion with the accused, and that it is made by the party injured by the offense; (3) that it is made within six months after the commission of the alleged offense. *The complaint shall be in writing and under oath,* but need not be in any particular form." Act 1868-'69, Bat. Rev., ch. 33, sec. 116. (381)

Here there was no complaint in writing under oath, negativing "collusion with the accused," which is necessary in order to confer jurisdiction. See *State v. Johnson,* 64 N. C., 581; *State v. Harris,* 65 N. C., 301.

PER CURIAM. No error.

JOHN G. VARNER v. ISAAC SPENCER, PENUEL ARNOLD and JOSEPH HOOVER.

1. Upon an indictment under sec. 15, ch. 64, Battle's Revisal, for removing a crop by a lessee: *It was held,* that gathering the crop and putting the same in a crib on the land upon which it was made, although under the control of the lessee—no intention of depriving the lessee of his share of said crop appearing—did not come within the meaning of the statute, and was not an indictable offense.

2. *It was further held,* that where such lessee after so putting the crop in the crib converted a portion thereof to his own use by feeding it to his stock without the consent of the landlord, this was a removal within the meaning of the statute, and indictable.

ACTION to recover damages for false imprisonment and malicious prosecution, tried before *McKay, J.,* at Fall Term, 1874, RANDOLPH.

The false imprisonment and malicious prosecution complained of was in a criminal action before Isaac Spencer, a justice of the peace of said county, instituted by the defend-

ant Arnold, against the plaintiff, under sec. 15, ch. 64, Battle's Revisal, for the removal of a part of the crop by the renter.

The defendants' counsel asked the Court to instruct the jury that if they were satisfied that the plaintiff had gath-
(382) ered the corn and put it in a crib under his own control, though upon the same tract upon which it was raised, without the landlord's consent, the same was a removal within the meaning of the statute; also, that if they were satisfied that the plaintiff had consumed a part of the crop, without the consent of the defendant Arnold, and had fed a part of it to his stock without the landlord's consent, this was a removal within the meaning of the statute.

There was evidence tending to show that the plaintiff had gathered and shucked the corn, and put it in a crib near the house in which he lived, upon the tract upon which it was grown, and also that he had fed a part of it to his stock, without the consent of the defendant Arnold.

The Court refused the instructions. The jury rendered a verdict against Arnold; judgment was pronounced, and the defendant appealed.

Tourgee and *Gregory,* for the appellant.
Scott & Caldwell and *Shipp & Bailey, contra.*

READE, J. By sec. 13, ch. 64, Bat. Rev., it is provided that where the lessee agrees in writing to pay the lessor a part of the crop, or to give a lien on the crop for rent, the possession of the crop shall be deemed to be in the lessor. And if the lessee or other person shall gather or remove any part of the crop without the consent of the lessor, he may recover it in an action for the same. And sec. 14 has the same provisions where rent in money is recovered.

The object of the statute is to secure the rent to the lessor; and the more effectually to do so, it not only gives him a "lien," but declares that the "possession" shall be deemed to be in him.

Still further to guard the interests of the lessor and to restrain a misappropriation of the crop, sec. 15 makes such misappropriation a misdemeanor. It will be noticed that

there is some difference in the language of sec. 13, (383) which gives the civil remedy, and sec. 15, which makes it penal.

The civil remedy is against the lessee or other person who shall *gather* or remove without the consent of the lessor. The indictment is against the lessee or other person who shall *remove* any part of the crop from the land; "gather" is left out.

It is to be regretted that a statute which is to operate upon the most illiterate and dependent, and to govern labor, should not be so plain as to be easily understood by all. Nothing ought to be obscure or dubious.

What we have to determine is what is meant by "shall remove any part of the crop from such land." On one side it is insisted that to pull the corn from the stalk, or to reap the wheat or oats, is meant. On the other side it is insisted that to carry the crop away off the land is meant. And his Honor was asked to charge "that if the lessee had gathered the corn and put it in a crib under his own control, although upon the same tract of land on which it was raised, without the landlord's consent, the same was a removal within the statute." That would, no doubt, have given the lessor his civil remedy, if the lessee had failed to give it up on demand. But would the lessee have been indictable for gathering and cribbing it unless he had failed to surrender it on demand; or unless he had appropriated it to his own use? Does the simple fact of gathering the crop for preservation in the ordinary course of husbandry come within the interdict of the statute? Such a construction would embarrass agricultural operations and punish men of the best intentions. The gathering and preservation of crops was not the evil intended to be remedied; but the wrongful appropriation, whether by carrying them off the premises or consuming them on the premises, was the evil.

In the case before us the gathering of the corn by the lessee and putting it in his crib was an act of doubtful import; if done simply for the purpose of preservation and not to deprive the lessor of his rights, it was not indictable; otherwise, it might have been. But gathering the corn and feeding it to his hogs was not of doubtful import; and for that he was indictable.

(384) We think the defendant was not entitled to the first instruction asked for, but that he was entitled to the second, viz., that the gathering and consuming a part of the crop without the lessor's consent is embraced in the statute. There is error.

PER CURIAM. *Venire de novo.*

Cited: Livingston v. Farish, 89 N. C., 142; *S. v. Williams,* 106 N. C., 648.

HENRY MELVIN and others v. JAMES K. MELVIN and others.

1. The words "except in cases of fraud," in sec. 16, Art. I, of the Constitution, comprehends not only fraud in attempting to hinder, delay and defeat the collection of a debt by concealing property and other fraudulent devises, but embraces also fraud in making the contract—false representations for instance, and fraud in incurring the liability; for instance, when an administrator commits a fraud by applying the funds of the estate to his own use, paying his own debts, and the like.

2. An administrator who has been fixed with assets is not necessarily a dishonest debtor, or been guilty of fraud in misapplying those assets, so as to exclude him from the privilege of being exempted by the Constitution from being imprisoned for debt.

3. An affidavit that does not set forth how the funds in the hands of an administrator have been misapplied, is not sufficient to justify holding him to bail.

MOTION to vacate an order of arrest, heard by *Russell, J.,* at chambers, in BLADEN, Spring Term, 1872, upon an appeal from an order of the Clerk of the Superior Court.

James K. Melvin, the administrator, had been fixed in the Probate Court of Bladen with assets to the amount of $308.88, for which amount this action is brought against him and his sureties. When the summons issued, Henry Melvin, one of the plaintiffs, filed the following affidavit:

(385) "That James K. Melvin was duly appointed and qualified as the administrator upon the estate of Sherrod Simmons, and took into his hands all the personal property of said Simmons, amounting to a large amount, and retained the same several years, without accounting with the

plaintiffs, who are entitled to the same. That an action was heretofore brought in the Probate Court of Bladen County for the purpose of recovering the distributive shares of the plaintiffs from the defendant, and a final decree was made by said Court, in which it was adjudged that the defendant was indebted to the plaintiffs in the sum of $308.88, for which sum an execution was issued and returned uncollected.

"That the defendant James K. Melvin has misapplied the assets of his intestate; that the defendant has been guilty of misconduct in not promptly paying over to the parties entitled to receive the same, the amount found due upon his account."

Upon this affidavit the Clerk issued an order of arrest, and the defendant was held to bail. Subsequently, after due notice, he applied to the Clerk to vacate said order, assigning the following grounds:

1. That the cause of action is not within the provisions of C. C. P., sec. 149.

2. That the affidavit is not signed by plaintiffs, or either of them.

3. That the affidavit sets forth that there is a judgment against the defendant for the same cause of action, and for the amount this suit is brought for, and for which he is now held to bail in the cause.

4. That the affidavit does not set forth how the funds have been misapplied.

5. That the affidavit does not set forth that there has been any fraud or dishonest conduct or transaction in the management of the estate.

The Clerk refused to vacate the order of arrest, and the defendant appealed to the Judge of the District.

Upon the hearing at chambers, his Honor reversed (386) the order of the Clerk and vacated the order of arrest, from which judgment the plaintiffs appealed to this Court.

R. H. & C. C. Lyon, for appellants.
W. S. & D. J. Devane, contra.

PEARSON, C. J. "There shall be no imprisonment for debt, in this State, except in cases of fraud." Const., Art. I, sec. 16.

The words, "except in cases of fraud," are very broad, and we declare our opinion to be that they comprehend not only fraud in attempting to hinder, delay and defeat the collection of a debt by concealing property and other fraudulent devices, but embrace, also, fraud in making the contract—false representations, for instance, and fraud in incurring the liability: for instance, when an administrator commits a fraud by applying the funds of the estate to his own use, paying his own debts, and the like.

The subject does not admit of much amplification. The words are broad, and we give to them their full meaning in order to discourage fraud in any form or shape. In support of this conclusion we rely upon the opinion delivered by *Winslow, C. J.,* of the Supreme Court of New Jersey, *Ex-parte Clarke,* 1 Spencer, 648, for which reference we are indebted to the diligence of Mr. Collins, who as *amicus curiæ* filed a brief in aid of the very meager arguments made when the case was heard, for which reason it was held under *advisari* for several terms. The principle involved was of very great importance, yet as the amount was trifling, the counsel employed by the parties paid no further attention to the case. In the duty of making an application of the general principle, "there shall be no imprisonment for debt except in cases of fraud," we have this question, Is every administrator who at the suit of a creditor or of a distributee is not able to account for the assets of the estate, to be treated as if he was guilty of fraud?

(387) The judgment of a creditor or distributee fixes him with assets, and if it be proved that he has the money in hand he will be ordered to pay the fund into Court; but suppose he is merely fixed with assets, and there is no telling from the pleading and affidavits whether he has embezzled the funds and put the money into his own pocket or has lost the assets by negligence in failing to collect notes due to the estate, owing to the stay-laws and other disturbing causes incident to the late war: it would be a hard measure to treat him as a dishonest man, excluded, because of fraud, from the provision of the Constitution.

At one time it was held by the courts in England, "when an administrator pleads *plene administravit,* and assets are found to the amount of, say, $100, he is fixed with assets for

the whole amount of the debt, because of his false pleading, in like manner as he was fined *de bonis propriis* by a plea of *payment by himself* and rendered against him because of the fraud. But the courts, under the enlightened views of *Lord Kenyon,* seeing that an administrator was sometimes fixed with assets by reason of "ill pleading," or of ignorance as to priority of debts, or of negligence in respect to the collection of the debts due to his intestate, adopted the rule which has ever since been the law. If an administrator pleads *plene administravit,* and you fix him with assets to the amount of $100, that is as far as you can charge him, *de bonis propriis.* See Williams' Notes to Sanders' Reports, 219, 337.

Applying these principles to our case, the administrator is fixed with assets to the amount of $308.88. Has he embezzled that amount and put it into his own pocket? We have no proof of the charge, and our decision is, that an administrator, although fixed with assets which should be forthcoming, is not thereby found guilty of fraud so as to exclude him from the privilege of being exempted by the Constitution from being imprisoned for debt, and is not to be treated as a dishonest debtor.

The exception to the affidavit is, "It does not set forth how the funds have been misapplied." It may have been by embezzlement or it may have been by neglect. (388)

We concur with his Honor that the order of the Probate Court ought to have been vacated.

PER CURIAM. Judgment affirmed.

Cited: Powers v. Davenport, 101 N. C., 293.

W. R. TRULL and VAN BROWN v. THE BOARD OF COMMISSIONERS OF MADISON COUNTY.

In order to pay debts contracted prior to the adoption of the Constitution, taxes may be levied by the County Commissioners without regard to the constitutional limitation or equation; but in regard to new debts, both must be observed.

(*Street v. Commissioners*, 70 N. C., 164; *Maury v. Commissioners*, 71 N. C., 486, cited and approved).

ACTION for an injunction against the Commissioners of MADISON County, heard before *Watts, J.*, at Fall Term, 1874, of said county.

The plaintiffs, for themselves and for others, the taxpayers of Madison, allege in their complaint, the foundation of their application for a restraining order, that on 5 July, 1874, the defendants levied upon the property of the citizens of the county a tax of $1.60 on the $100 worth of said property; and insisting that such taxes should by law have been levied at their regular meeting, on the 1st of the preceding February.

The plaintiffs further allege that the taxes so levied are more than double the State tax, and more than $2 on the $300 worth of property, being levied without regard to the equation prescribed and the limitation contained in the Constitution. They therefore pray for an order restrain-
(389) ing the defendants, etc.

In their affidavit the plaintiffs state specifically the debts for the payment of which much of the taxes levied was to be appropriated, contending that they were new debts, contracted since the adoption of the Constitution.

In answer to the complaint, one of the board files the following affidavit:

The former Board of Commissioners, on 2 June, 1874, as appears from the records of said board, levied a tax of $1.60 on the $100 worth of property, and eighty cents on each poll in the county for county purposes. It is stated on said records—the minute-book of said board—that said tax is for the following purposes, although on the tax-lists subsequently placed in the hands of the tax collector by said board

it does not appear for what purposes the said tax was levied, no part of the said $1.60 on the $100 worth of property being specially set apart for any special purpose, to-wit:

27 cents on the $100 to pay for the court-house.
28 cents on the $100 to pay E. Sluder's claims.
35 cents on the $100 to pay the Young judgment.
10 cents on the $100 to pay White, Nelson & Gudger.
33 1-3 cents on the $100 to pay instanter claims.
27 2-3 cents on the $100 to pay for general county purposes.

The debt due for the court-house was contracted prior to the adoption of the State Constitution, and the tax of 27 cents aforesaid is not more than sufficient to pay the same; the claims of E. Sluder are founded upon claims surrendered to the Board of Commissioners on 8 October, 1872, upon the compromise of a suit then pending against said board for the recovery of the same, and the claims surrendered, and for which claims were issued on the said 8 October, were created, a portion of them before and a portion of them after the adoption of the Constitution of the State, as this affiant is informed; the Young judgment was recovered upon claims for jail fees, witness and jury tickets, the fees of clerks and other officers in criminal cases, etc., a part having been contracted before the adoption of the Constitution and a part afterwards, as this affiant is informed; the claim or judgment of White, Nelson & Gudger was for fees due witnesses and jurors in criminal cases, for debts (390) contracted for the support of the poor, etc.; that this affiant is informed that a part of the same was existing at the adoption of the Constitution and a part was afterwards created; the "instanter claims," for the payment of which 33 1-3 cents on the $100 worth of property was levied, is a class of claims issued from time to time by the board in payment of the current expenses of the county, and the tax levied to pay them was regarded by the board as a part of the tax for county purposes, as this affiant is informed and believes, to be added to the 26 2-3 cents, more particularly referred to on the minutes of the board as a tax for general county purposes.

This affiant, referring more particularly to the aforesaid claims, judgments, etc., further says: That although the

minutes of the board show that a certain tax was levied in the year 1873 to pay for the court-house and to pay E. Sluder, yet the tax-lists delivered to the tax collector for that year did not show that any special tax had been levied for such purposes; besides, the taxes collected for that year were otherwise appropriated by the former Board of Commissioners, to-wit, to pay the necessary expenses of the county, and were not paid either on the court-house debt or to E. Sluder. In fact, this affiant is informed and believes that the E. Sluder claim, for the payment of which a certain tax was levied in 1873, was a different claim from the one which this year's tax is levied to pay; that he is unable to state, nor has he the means now of ascertaining what proportion of the aforesaid claims, etc., were existing at the time of the adoption of the present State Constitution, though he is informed and believes that a large proportion of the same were existing when the Constitution was adopted. And furthermore, peremptory *mandamus* has been issued commanding the Board of Commissioners to lay and collect a tax sufficient to pay the Young judgment, and the White, Nelson & Gudger judgment, all aforesaid.

This affiant further shows that according to the last assessment the balance of all the real and personal property in the county is only $420,306; and a tax of only double the State tax would produce but $3,362.44—a sum barely adequate to the payment of the necessary expenses of the county—leaving the indebtedness of the county unprovided for, although the honor of the county is pledged for the payment of at least a part of it, as this affiant is informed and believes.

The taxes for the several purposes aforesaid were levied, as this affiant is informed, with no design to evade any
(391) law of the land, but for the honest purpose of freeing the county from the pecuniary embarrassments that have heretofore proved so destructive of the best interests of the people of the county.

Upon the hearing in the Court below, on the complaint and affidavit, his Honor refused to grant the restraining order, and the plaintiffs appealed.

J. H. Merrimon, for the plaintiffs.
M. E. Carter, for the defendants.

READE, J. The plaintiffs seem to have carelessly fallen into the error of supposing that the defendants had levied taxes to pay debts which were not owing, and that the alleged debts, if they existed at all, were contracted since the adoption of the Constitution, and that therefore the limitation and equation of taxation in the Constitution prevented the levy complained of. But it appears from the defendants' affidavit, which presents the facts upon which we have to rely, that the debts are owing, and that a large portion of them were contracted prior to the adoption of the Constitution.

In order to pay the debts which were contracted prior to the Constitution, taxes may be levied without regard to the constitutional limitation or equation; but in regard to new debts, both must be observed. *Street v. Commissioners,* 70 N. C., 644; *Mauney v. Commissioners,* 71 N. C., 486.

The ruling of his Honor must be modified so as to ascertain how much of the tax levied on property is necessary to pay debts contracted before the Constitution, and allow that to be collected, and then allow twenty-six and two-thirds cents (that being one-third of the eighty cents poll tax) on the hundred dollars worth of property to be collected for county purposes, and then restrain the excess, if any excess there be. Each party will pay his own cost in this Court.

PER CURIAM. Judgment accordingly.

Cited: French v. Wilmington, 75 N. C., 482; *Clifton v. Wynne,* 80 N. C., 147-9; *Cromartie v. Comrs.,* 87 N. C., 139; *Barksdale v. Comrs.,* 93 N. C., 476; *Bd. of Education v. Comrs.,* 107 N. C., 112; *Williams v. Comrs.,* 119 N. C., 525; *Herring v. Dixon,* 122 N. C., 423.

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R. H. & C. C. LYON v. J. L. McMILLAN.

It is error to set aside a judgment obtained at a regular term of the Court upon motion, without notice to the adverse party.

(*Sutton v. McMillan, ante*, 102, cited and approved).

MOTION to set aside a judgment, heard before *Russell, J.*, at chambers.

The judgment was obtained at Spring Term, 1872, Bladen Superior Court, on a note under seal, made by the defendant to one Julia Callahan, which note had been transferred to the plaintiff for value received.

The plaintiff filed a complaint demanding judgment for four hundred and five dollars, with interest from 24 May, 1870, and for cost, $900. The defendant failing to file an answer, and no attorney's name being marked on the docket for him, on the last day of the term the plaintiff moved for and obtained judgment by default for the amount demanded.

E. W. Kerr, an attorney at law, who was the partner of A. A. McKay, who was the attorney of the defendant, but failed to attend Court at that time, was in attendance upon the Court during the whole term at which said judgment was rendered, but was unknown to the defendant as an attorney or in any other way. The defendant was personally present in Court several times during the term at which said judgment was rendered.

On 27 April, 1874, before *Judge Russell,* the defendant moved for and obtained an order to set aside the judgment in said action.

No notice was ever given to the plaintiffs or either of them, of the said motion, and they did not know that such order had been made until 21 September, 1874, when the order was shown by the Clerk of said Court, at which time they caused an appeal to be entered.

R. H. & C. C. Lyon, for appellants.
E. W. Kerr, contra.

(393) SETTLE, J. A judgment obtained at a regular term of the Court was set aside by his Honor at chambers, on motion of the defendant, no notice of such motion having

been given to the plaintiff. See *Sutton v. McMillan, ante,* 102.

There is error. Let this be certified.

PER CURIAM. Judgment reversed.

Cited: Fisher v. Mining Co., 105 N. C., 126.

M. M. DOYLE and others v. JOHN E. BROWN, guardian ad litem of MARY A. LEEPER.

1. Where a defendant has never been served with process nor appeared in person or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated wherever and whenever offered, without any direct proceeding to vacate it.

2. If a record shows one to be plaintiff, when in fact he was not, it stands as where the record shows one to be defendant when he was not. In both cases the record is conclusive until corrected by a direct proceeding for that purpose.

MOTION to set aside a decree, and for other relief, heard before *Logan, J.,* at Spring Term, 1874, MECKLENBURG.

The following are the substantial facts as found by the Court, by consent of the parties, and sent up as part of the record:

James Lonnegan died in the county of Mecklenburg in the year 1860, seized and possessed of a house and lot in the city of Charlotte and a tract of land in the county of Gaston. Lonnegan had no lineal descendants, but left brothers and sisters, and the children of brothers and sisters, as his heirs at law. The plaintiffs are the nephews and nieces, and entitled by representation to one-fourth part of his estate.

In December, 1862, a petition was filed in the Court of Equity for Mecklenburg County for the sale of the real estate of the said James Lonnegan, for the purpose of a division among the heirs at law, including the plaintiffs, (394) now petitioners. At December Term of said Court a decree was made directing said lands, viz., the house and lot in the city of Charlotte and the plantation in the county of Gaston, to be sold.

Said real estate was sold 22 December, 1862, when Edward Lonnegan, one of the petitioners, in his own right and as next friend for certain minor children, became the last bidder for the town lot, at seven thousand dollars, and that the Gaston County lands brought $7,750 in Confederate money, John Pendergrast, another of the petitioners, becoming the highest bidder. The bid of Pendergrast was transferred to Young & Winston. At Spring Term of said Court, 1863, the sale was confirmed, the purchasers giving their notes at six months. In the month of May said notes were paid in Confederate money and titles made to the purchasers, viz., to Edward Lonnegan for the town lot and to Young & Winston for the Gaston plantation.

Afterwards, all the said petitioners, except the plaintiff, recovered from the Clerk and Master their part of the proceeds of said sale. It is further found by the Court, the same question having been heretofore passed upon by a jury, that at the time the said bill in equity was filed for sale of said lands, and at the time of said decree, the plaintiffs were non-residents of this State and were residents of the State of Arkansas. That they had no notice or knowledge of the filing of the said bill in equity nor of the said decree and sale, nor of the confirmation thereof; and that the plaintiffs have not in any way assented to or ratified the said proceedings since they came to their knowledge in the year 1867. The Court further finds that Edward Lonnegan either occupied or received the rents of the house in Charlotte up to the time of his death; that by his last will and testament he devised the same and lot to the defendant, who has received the rents therefor since the death of Edward Lonnegan.

(395) Upon the foregoing facts it was adjudged by his Honor that the plaintiffs were not estopped by the decree of sale, and that they were tenants in common with the defendant. It was further adjudged that the plaintiffs were entitled to an account for the rents and profits, the use and occupation of the house and lot in Charlotte during the time the defendant has occupied the same. It was thereupon ordered that the said house and lot be sold for the purpose of a division between the plaintiffs and the defendant, and that an account be taken of the rents, etc., since the death of Edward

Lonnegan; and that the said sale be made at the court-house in Charlotte, upon thirty days' notice, on a credit of six and twelve months.

From this judgment the defendant appealed.

Wilson & Son, for appellant.
Vance & Dowd and *Shipp & Bailey, contra.*

READE, J. Where a defendant has never been served with process, nor appeared in person or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated whenever and wherever offered, without any direct proceedings to vacate it. And the reason is, that the want of service of process and the want of appearance is shown by the record itself, whenever it is offered. It would be otherwise if the record showed service of process or appearance, when in fact there had been none. In such case the judgment would be apparently regular, and would be conclusive until by a direct proceeding for the purpose it would be vacated.

A plaintiff needs not to be *brought* into Court: he *comes* in. A judgment is of no force against a person as plaintiff, unless the record shows him to be plaintiff. If the record shows him to be plaintiff, when in fact he was not, then it stands, as where the record shows one to be defendant when he was not. In both cases the record is conclusive until corrected by a direct proceeding for that purpose.

Here the record sought to be impeached shows that (396) the plaintiff in this case was plaintiff in that, although in fact she was not. The record must, therefore, stand against her until it is vacated. And so the defendant insists that this action cannot be maintained, because, he says, the plaintiff is estopped by the record.

But the defendant's error is in misunderstanding the scope of this action. It *is* an action in the nature of a bill in equity to vacate the said decree, but not alone for that. It sets forth the proceedings and the decree in the former action, and that the plaintiff was not, in fact, a party thereto, and had no knowledge of it, being at the time, as she is now, a non-resident. And it demands to have the proceedings and decree vacated and declared void. And the facts are found to be as alleged, and the proceedings and decree are in effect vacated

and declared void as to the plaintiff. It is true that the action goes farther, and demands that the plaintiff be declared a tenant in common with the defendants in the premises, and that they be sold, etc. All this was proper, and yet it is not the less a direct proceeding to impeach the former decree.

There is no error. This will be certified to the end that such further proceedings may be had as the law directs and the rights of the parties require.

PER CURIAM. Judgment affirmed.

Cited: Gulley v. Macy, 81 N. C., 366; *Weaver v. Jones,* 82 N. C., 442; *England v. Garner,* 84 N. C., 214; *Koonce v. Butler, Id.,* 223; *Johnson v. Futrell,* 86 N. C., 123; *Condry v. Cheshire,* 88 N. C., 378; *Lynn v. Lowe,* 88 N. C., 481; *England v. Garner,* 90 N. C., 202; *Stancill v. Gay,* 92 N. C., 463; *Sumner v. Sessoms,* 94 N. C., 377; *Edwards v. Moore,* 99 N. C., 4; *Brickhouse v. Sutton, Id.,* 108; *Brittain v. Mull, Id.,* 491; *McIver v. Stephens,* 101 N. C., 260; *Whitehurst v. Transportation Co.,* 109 N. C., 344; *Harrison v. Hargrove, Id.,* 348; *Williams v. Johnson,* 112 N. C., 438; *Lowe v. Harris, Id.,* 491; *Isley v. Boon,* 113 N. C., 252; *Harrison v. Hargrove,* 120 N. C., 102; *Ditmore v. Goins,* 128 N. C., 327.

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STATE ex rel. G. W. AVENT, guardian of A. J. T. AVENT, v. J. A. WOMACK, admr., and K. MURCHISON.

1. A guardian is liable not only for what he does receive, but for what he ought to receive, and if he ought to receive a certain amount in money, and does not, but takes something else—his own bond for instance, in the place of money—he and his sureties are liable.

2. Therefore, where a guardian bought property for himself at the sale of the father of his ward, giving bond with surety therefor to the administrator, and subsequently the administrator surrendered the bond, such guardian who receipted therefor as so much money paid his ward under the impression that the ward was entitled to something of his father's estate as distributee, and it subsequently turned out that the estate was insolvent: *Held*, that the non-payment of the amount receipted for was a breach of the guardian bond, and the surety thereon was liable therefor.

ACTION on a guardian bond, tried before *Buxton, J.*, at Fall Term, 1874, HARNETT.

One Alvin Avent died intestate in Harnett County in 1862, leaving real and personal estate. Said Avent left one child, A. J. T. Avent, his only son and heir at law, who is still under age.

N. G. Jones, grandfather of the minor, and intestate, one of the defendants, was appointed guardian 8 June, 1863, and gave bond with K. Murchison, the other defendant, as surety in the sum of $20,000.

B. I. Howze administered upon the estate in 1863, taking possession of the personal property, and renting out the land for the year 1863.

At several sales made by Howze in 1862, N. G. Jones became the purchaser of personal effects, and gave his note at six months to secure his purchases. There were three notes, each with the same securities. One note due 3 April, 1863, for the sum of $35; one note due 26 February, 1863, for $287.60, and one for $61, due 24 December, 1863. These notes were payable in currency. N. G. Jones also hired of Howze, the administrator, certain slaves belonging (398) to the estate, for the years 1863 and 1864, the hire to be paid in good money, secured by two notes with the same security.

One of these notes was for $81, due 1 January, 1874, and the other for $151, due 1 January, 1865. N. G. Jones also occupied the dwelling-house and cultivated, as his own, the land of his ward during the years 1864, 1865 and 1866, the annual rent of which was worth $100 in good money. N. G. Jones, as guardian, kept no account and made no returns.

In 1867 N. G. Jones removed from this State to Arkansas, taking his ward with him. The ward lived with his guardian until the death of the latter in 1871, and continued to live in the family until his return to this State in May, 1873.

When N. G. Jones, guardian, was about to remove from this State, he had a partial settlement with Howze, the administrator of his ward's father. Having concluded that the ward would be entitled to something from his father's estate as distributee, Howze, instead of requiring Jones to pay the above-said notes, upon which one Cameron was security, surrendered them and took from Jones the following receipt:

Received of B. I. Howze, administrator of A. Avent, deceased, thirty-five dollars, 2 April, 1863. Four hundred and eighty-seven dollars and sixty cents, February, 1863. Sixty-one dollars, 24 December, 1862. Eighty-one dollars, 1 January, 1864. One hundred and fifty dollars, 1 January, 1865.

N. G. JONES, *Guardian.*

No money actually passed in this transaction. The notes of Jones for the above-named amounts were merely surrendered by Howze.

After Jones removed from the State B. I. Howze, in the name of the guardian, continued to rent out the land of the ward from year to year, the net proceeds of which amounted to $358. Instead of paying this to Jones, the guardian, Howze applied it in payment of outstanding debts of his intestate. Howze, as administrator of Alvin Avent, has
(399) also sold a part of the land, for assets, and swears it will be necessary to sell more for that purpose.

All that ever went into Jones' hands as guardian, either as property or property's worth, were the amounts specified in the above-mentioned receipt, under the circumstances stated. Jones, as stated, occupied the house and land of his ward for three years.

When Jones received his note and left the State he was solvent, and the notes could have been collected. Upon the death of Jones in 1871, the plaintiff, George W. Avent, succeeded him as guardian of A. J. T. Avent. The defendant John A. Womack qualified as administrator in this State and in this suit pleads a want of assets.

Previous to his departure from this State the ward resided partly with his guardian, N. G. Jones, and partly with his relation, Mrs. Avent, both of whom furnished him with clothes. In Arkansas he resided with his guardian, N. G. Jones, who provided for him. His board and clothes in this State were worth $60 *per annum,* and in Arkansas $87 *per annum.* After 1871 the rent of the land was received by his present guardian.

The case was referred for the purpose of stating an account, and a balance of $446.31, with interest, found in favor of the plaintiff.

The plaintiff filed the following exceptions to the report of the referee:

1. He scales the two last items in the receipt of Jones, for negro hire, which the evidence shows was for good money.

2. He should have scaled the first three items in the said receipt at the dates the notes were given by Jones, and not at the times when they fell due.

3. He does not charge the defendants with the amounts received by Howze as agent for Jones.

The defendants filed the following exceptions:

1. The defendant Kenneth Murchison objects to the (400) finding of the referee in regard to the receipt N. G. Jones gives as guardian to B. I. Howze, and submits that as security for the guardian he is not liable. The consideration being, according to the testimony of Mr. Howze, an individual and private debt of N. G. Jones and not coming into his hands as funds of his ward.

2. That the security on the guardian bond should not be charged with land cultivated and houses occupied by N. G. Jones, especially during the war, unless it appears that he might have rented the land to other suitable persons; it being the guardian's duty to take charge of the same, and further, that such use is not funds coming into the hands of the guard-

ian of such a character as to make the security on the guardian bond liable for the same.

3. That the referee erred in not charging the ward with his board and clothing, for the reason given by him, that he would be exceeding the income of his ward's estate, especially as he charges the guardian with the use and cultivation of the houses and land, which we respectfully submit is nothing but income from his estate, and might all have been expended in his board and clothing.

His Honor sustained the first and second exceptions of the plaintiff, and overruled the third.

The first and second exceptions of the defendant were overruled, and the third sustained.

The account being reformed in accordance with the ruling of his Honor, judgment was rendered for the plaintiff. The defendant J. A. Womack having pleaded "fully administered and no assets ultra," judgment *quando* was rendered against him.

Thereupon the defendant Murchison appealed.

W. McL. McKay and *Neill McKay,* for appellant.
H. A. London, Jr., contra.

(401) READE, J. The defendant Murchison was surety on the guardian bond of the plaintiff's guardian.

The plaintiff ward was supposed to be entitled to an interest in the estate of his deceased father. And at the sale of the estate of his father his guardian bought property for himself, and gave his bond therefor, with surety, to the administrator. And subsequently the guardian took his bond back from the administrator, and gave the administrator a receipt as guardian for the amount of the bonds as so much money for his ward. And the same was true of some other bonds which he had given the administrator for the hire of slaves. The guardian died insolvent. And the only point made in this Court is, whether the non-payment of that amount by the guardian to his ward is a breach of his guardian bond for which the defendant is liable as surety.

The defendant insists that he is not liable, for two reasons:

1. Because, in fact, the guardian did not receive any money, and thereby he was the less able to pay the ward and

save the defendant harmless. To this it is answered that if he did not receive money, he received money's worth, the property bought at the sale, and also his own bond, which he would have had to pay.

And again, a guardian is liable not only for what he does receive, but for what he ought to receive; and if he ought to have received the amount in money and did not, but took something else—his own bonds, in the place of money—he and his sureties are liable.

2. Because, in fact, there was nothing due the ward from the estate of his father; for, although at that time it was supposed that that amount would be due the ward, yet, subsequently, the estate proved to be insolvent.

This cannot avail the defendant. If an administrator chooses to pay over to a distributee, it is only under peculiar circumstances that he can be heard to say that nothing was due, and recover it back. But here the administrator makes no complaint; and surely no one else can.

It is proper to remark that there is no allegation (402) that any fraud was intended between the administrator and guardian for the purpose of affecting the defendant. If there had been, it would have presented a different case. But the transaction was a fair one, and was for convenience only. The guardian was solvent at the time, and was the grandfather of the ward, and he, with the ward, were about removing from the State.

PER CURIAM. Judgment affirmed.

G. G. HILL and others, heirs at law of A. S. GIBSON, v. J. W. ALSPAUGH, admr. of S. J. GIBSON.

After the expiration of six months from the death of a decedent, the public administrator and those having a right of priority, failing to apply for letters of administration, the Probate Judge is authorized to treat all rights of preference as renounced, and, in the exercise of his discretion, to appoint some suitable person to administer upon the estate of such decedent.

SPECIAL PROCEEDING, tried before *Kerr, J.*, at Fall Term, 1874, GUILFORD.

A verbal application was made to the Probate Judge of Forsyth County by the plaintiff for an order upon the defendant to show cause why letters of administration granted to him on the estate of J. S. Gibson should not be vacated and the plaintiff appointed in his stead, as next of kin to the deceased.

Notice was served on the defendant to appear and show cause on 8 August, 1874, on which day the defendant appeared and showed cause in writing. Upon consideration of the plaintiff's application, the same was refused by the Court. From the judgment of the Court the plaintiff appealed to the Superior Court. As his Honor, *Judge Wilson,* was of counsel in the cause before the Probate Judge,
(403) the case was removed by consent to Guilford County.

It was agreed as a fact found, that there had been no renunciation on the part of the next of kin or those entitled by prior right to letters of administration, and no citation issued to them, or either of them, to show cause why they should not be deemed to have renounced. The only point presented to the Court by the record from the Probate Court was the validity of the defendant's appointment. Notwithstanding the lack of such renunciation and citation, the defendant insisted that the fact of Hill having failed to give bond heretofore, and the lapse of time since the death of the intestate, amounted to a renunciation, or rendered a renunciation and citation unnecessary. His Honor reversed the judgment of the Probate Court and gave judgment for the plaintiff, whereupon the defendant appealed.

Dillard & Gilmer and *Shipp & Bailey,* for appellant.
Scales & Scales, contra.

SETTLE, J. Isaac S. Gibson died intestate in July, 1871. His widow, who was primarily entitled to the administration of his estate, died in early part of 1873, without having applied for letters of administration. On 6 October, 1873, the plaintiff, representing the next of kin, applied to the Court for letters of administration on the estate of the said Gibson, and the application was granted upon condition that the plaintiff gave bond and security as required by law.

On 2 June, 1874, the plaintiff having failed to give bond as required, and no other person having applied for letters on said estate, the Court granted letters to the defendant, a large creditor, he having first proved his debt and tendered a bond with good and sufficient security for the faithful performance of his duties. The defendant did not notify the plaintiff or any of the next of kin of his intention to apply for letters of administration.

The case, settled by counsel, states that the only (404) point presented to his Honor for consideration was whether the appointment of the defendant was valid, notwithstanding the want of renunciation by the next of kin and the citation to them required by statute. Bat. Rev., ch. 45, secs. 6 and 8.

There is some obscurity in the statute regulating this subject, but the main purpose was to designate some one to care for and promptly administer the effects of an intestate. Preference is given to certain persons in classes, provided they assert their rights in due time. But when the period of six months has elapsed from the death of any decedent, and no letters testamentary or letters of administration or collection have been applied for and issued to any person, the public administrator shall apply for and obtain letters on the estate of such decedent. But suppose the public administrator does not come forward and do his duty: how long is the door to be kept open for those primarily entitled to come in?

In this case more than three years had elapsed since the death of the intestate before any one qualified as his administrator.

When the plaintiff, representing the next of kin, first delayed for two years to make application for letters, and then failed for more than eight months after the order granting him letters, to qualify by giving the proper bond, the Probate Court, creditors and all others were authorized to conclude that there had been such unreasonable delay as to forfeit all right of preference, and to dispense with the formalities of renunciation and citation, which the plaintiffs now contend should have been observed.

We think the true intent and meaning of the statute is that the persons primarily entitled to administration shall assert their right and comply with the law within six months after the death of the intestate, and that a party interested, wishing to quicken their diligence *within that time,* must do so by citation as prescribed by the statute, or if a person, not preferred, applied for administration *within six months,* he must produce the written renunciation of the person (405) or persons having prior right. But after the expiration of six months, should the public administrator fail to apply, the field is open to the Probate Court to treat all rights of preference as renounced, and to appoint, in the exercise of its discretion, some suitable person to administer the estate. This view is in accord with public policy, which requires the estates of decedents to be promptly administered and distributed among the persons entitled thereto.

PER CURIAM. Judgment reversed. Case remanded.

Cited: Garrison v. Cox, 95 N. C., 356; *Williams v. Neville,* 108 N. C., 561; *Withrow v. DePriest,* 119 N. C., 544.

HENRY W. FAISON v. H. BOWDEN, exr. of B. L. HILL.

The new promise, necessary to repel the bar of the statute of limitations, must be definite, and show the nature and amount of the debt; or must distinctly refer to some writing, or to some other means, by which the nature and amount of the debt can be ascertained. Or there must be an acknowledgment of a present subsisting debt, equally definite and certain, from which a promise to pay such debt may be implied.

(The case of *McBride v. Gray*, 44 N. C., 420, cited and approved).

ACTION, tried before *Russell, J.*, at Spring Term, 1874, DUPLIN, to recover the amount of a medical bill, beginning in 1854 and running up to the death of the testator of defendant in November, 1861, and continuing after the death of the testator. Defendant denied the account, and relied upon the statute of limitations, and also alleged that he had fully administered the assets of the testator.

On the trial in the Court below Dr. Daniel E. Smith, a witness for the plaintiff, testified that he was acquainted with the family of the testator, and knew that plaintiff was his family physician during the period embraced (406) in the account, and had seen him practicing there. He thought the bill reasonable for the medical attention of a family of that size. Other witnesses proved that plaintiff was testator's family physician.

W. E. Hill testified that he heard testator say about the year 1860, he owed plaintiff a considerable debt; that plaintiff was one of his largest creditors. D. C. Cobb and R. B. Hatch heard testator about the same time say the same thing.

Harris Barfield heard the testator say to the plaintiff in October, 1858: "I can't pay you what I owe you, but I will pay you soon, or next winter. I need what money I have now for building, and it will do you more good to get it in a lump." No definite sum was mentioned and no account or memoranda shown, mentioned or alluded to in this conversation.

The counsel for defendant insisted that the testimony was not sufficient to take the case out of the statute of limitations, and that the plaintiff could only recover, if at all, the amount of the account for the three years immediately preceding the first day of September, 1861.

His Honor charged the jury that if they believed the indebtedness alluded to in the conversation to which Harris Barfield testified, alluded to this particular medical bill, then the statute of limitations had been rebutted, and the plaintiff could recover.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Stallings, for appellant.
Smith & Strong and *E. W. Kerr, contra.*

RODMAN, J. The evidence which is relied on by the plaintiff to take the case out of the statute of limitations is as follows:

"W. E. Hill heard testator say, about 1860, that he owed the plaintiff a considerable debt; that plaintiff was
(407) one of his largest creditors. D. C. Cobb and R. B. Hatch heard testator about the same time say the same thing. One Barfield heard the testator in October, 1858, say to the plaintiff: 'I can't pay you what I owe you, but I will pay you soon, or next winter. I need what money I have now for building, and it will do you more good to get it in a lump.' No definite sum was mentioned, and no account or memoranda shown, mentioned or alluded to in the conversation."

His Honor instructed the jury that if they believed that the testator referred to the account now sued on, they should find for the plaintiff on the issue made by the plea of the statute.

In this we think his Honor erred. The rule to be gathered from the numerous cases to which we were referred by the counsel may be thus expressed: The new promise must be definite, and show the nature and amount of the debt, or must distinctly refer to some writing or to some other means by which the nature and amount of it can be ascertained; or, there must be an acknowledgment of a present subsisting debt, equally definite and certain, from which a promise to pay such debt may be implied. *McBride v. Gray,* 44 N. C., 420.

In the present case there was evidence in the relations shown to have existed between the parties from which a jury

might have inferred the nature of the debt, viz., that it was for medical services; but there is nothing in the conversations given in evidence which would enable any one to ascertain its amount.

Per Curiam. *Venire de novo.*

Cited: Faison v. Bowden, 76 N. C., 425; *Riggs v. Roberts,* 85 N. C., 155; *Hussey v. Kirkman,* 95 N. C., 67; *Taylor v. Miller,* 113 N. C., 342.

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(408)

C. N. McADOO and others v. WILLIAM M. THOMPSON and wife, and others.

A judgment against an administrator fixing him with assets, and which judgment he has paid, is no bar to an account of assets subsequently received and not accounted for.

Creditor's bill, heard before *Tourgee, J.,* at Spring Term, 1874, Guilford.

The bill was filed by the plaintiffs against the administrators and heirs of one Samuel Coble, deceased, to subject the real estate of the decedent or a portion thereof to sale for the purpose of paying the debts of the plaintiffs.

When the case was called for trial, those of the defendants who were heirs of the deceased moved for an order of reference to take an account of the administration of the defendants David and W. A. Coble, the administrators of the deceased.

This motion was resisted upon the ground that a suit had been brought in the Superior Court of Guilford County by all the next of kin of the deceased, who are also his heirs at law and defendants in this action, in which a reference had been made to a commissioner, an account stated, and a judgment rendered against the administrators. That said judgment had been satisfied, and the administrators insisted that the other defendants in this case, the heirs at law, were concluded by said report and judgment, and estopped from denying that said administrators had fully administered on said estate.

The Court held that the heirs at law were entitled to the reference, and ordered that the case be referred to the Clerk to take an account.

The administrators excepted to the ruling of the Court:

1. Because said reference was unnecessary.
2. That the Court erred in making said order.

Notice of appeal waived, bond filed.

(409) *Collins, Scott & Caldwell,* for appellant.
Scales & Scales, Dillard & Gilmer and *Morehead, contra.*

BYNUM, J. The defendants do not deny that the plaintiffs are creditors of the estate, but the answers raise issues between the two sets of defendants which should be settled before the rights of the plaintiffs are determined. The administrators in their answer allege that the next of kin sued them upon their administration bond for the settlement of the estate and the payment of their distributive shares of the estate; that in said action an account was taken of the whole estate and of their administration; a final judgment rendered against them in favor of the next of kin, which they have paid in full; they therefore claim that the plaintiffs should resort to the land descended to these next of kin, who are the heirs at law of the intestate.

The next of kin in their answer claim in a vague and general way that errors were committed in said settlement, and that provision was therein made for the payment by the administrators of these outstanding debts. The answer, by way of counter-claim, or in any other respect, is wholly insufficient as an action to surcharge and falsify the account and judgment referred to, because the grounds of error are not set forth with the specific, definite and positive certainty required by the rules of equity, so that issues can be made upon them. *Mebane v. Mebane,* 36 N. C., 403; *Compton v. Culberson,* 17 N. C., 93. But the answer does allege positively that since the said judgment was rendered the administrators have received other assets of the estate more than sufficient to pay these debts, and this allegation does not appear to be denied by the administrators, but they rely on the bar to further inquiry, which they claim as the effect of the judgment. Un-

questionably, this judgment is no bar to an account of assets subsequently received and not accounted for. The next of kin are therefore entitled to this account; but in taking it the referee will be confined to an account of assets received since the former account was taken. All the defendants in their answer claim that these plaintiffs, before this action was begun, had released their said debts to the administra- (410) tors. If this is so, that release inured to the benefit of the next of kin and heirs at law; but as it is not set forth and pleaded sufficiently, this Court cannot pass upon its legal effect. In taking the account the referee should give the defendants such benefit of the release, if there is one, as they may in law be entitled to. With these limitations, the judgment of the Superior Court must be

PER CURIAM. Affirmed.

Cited: Suttle v. Doggett, 87 N. C., 205.

HAITHCOCK & HEARNE v. SWIFT ISLAND MANUFACTURING COMPANY.

A deed conveying to A the land on one side of a river "with all the appurtenances thereto belonging," does not convey the title to one-half of a ferry which is not annexed as of right as appurtenant to said land.

(*State v. Willis,* 44 N. C., 223; *Biggs v. Ferrell,* 34 N. C., 1, cited and approved).

ACTION to recover title and possession of one-half of a ferry, tried before *Buxton, J.,* at Fall Term, 1874, of STANLY.

The ferry in question had been established by the Fayetteville and Albemarle Plank Road Company, by authority of an act of the General Assembly ratified 16 February, 1859. It was located at Swift Island, across the Pee Dee River. The plank road having fallen into decay, and being discontinued as a turnpike, S. H. Christian, who was the riparian owner on both sides of the river, claimed the franchise of the ferry, and at the time of his death, in 1864, was seized of land on both sides of the river, and keeping up the ferry.

After the death of S. H. Christian, upon failure of
(411) his personal estate, his administrators instituted proceedings in the Superior Court of Montgomery County to sell the real estate for the payment of his debts.

The petition for that purpose was filed at Fall Term, 1867, and at that term a decree was made authorizing the sale of all the lands, mills, and other real estate mentioned in the petition. Among the tracts included was the "mill tract" in Montgomery, and the "Davis" tract in Stanly. These tracts were described fully, but neither in the petition nor in the decree of sale is there anything said about the ferry.

There was a report of sale made to Spring Term, 1868, by the administrator in reference to the "mill tract." The report was as follows, to-wit: "The mill on the Montgomery side, and factory, with outhouses and other appurtenances, was bid off by Nathaniel Knight, for the sum of $3,200. D. N. Patterson afterward raised the bid to $3,400, and gave his note, with C. W. Wooley and J. T. Bradly as surety."

This sale occurred 14 November, 1867, and was confirmed at Spring Term, 1868.

In reference to the lands on the Stanly side, they report that the lands did not bring a fair price, and that the purchaser had not complied with the terms of sale, and accordingly a resale of the Stanly lands was ordered.

At Spring Term, 1869, they report the sale of the Stanly lands as having occurred on 18 February, 1869; that the William Davis tract was bought by one J. G. Christian for $125. This sale was confirmed at that term, and upon payment of the purchase money the administrators, in pursuance of the order of the Court, executed a deed, in which the land is described as follows, to-wit:

"All that tract or parcel of land lying and being in the county of Stanly, and described as follows: Lying on the west side of Pee Dee River, adjoining the land of William Davis and others, bounded as follows, viz.: Beginning at a white-oak on the bank of the river, just below the mill, and running thence due west with Haithcock's and Heron's mill
(412) tract (formerly S. H. Christian's) 29 chains to a stone-heap in the field, corner of No. 5; thence south 50 degrees 30 minutes, east 23 chains to a post-oak, by a post-oak, thence south 60, east 4 chains to a corner on a line of the

mill tract, by a post-oak and hickory pointers, thence with said line north 46, east 22 chains 50 links to the river, thence up the river to the beginning, containing seventy-five acres, more or less; to have and to hold, to him the said party of the second part, his heirs and assigns forever, with all the appurtenances thereunto belonging."

On 22 January, 1870, J. G. Christian and his wife executed a deed conveying this property to the plaintiff, with a similar description.

Upon the payment of the purchase money for the "mill" tract in Montgomery, the administrators executed a deed on 25 September, 1871, to D. N. Patterson, who purchased for the benefit of the Swift Island Manufacturing Company, of which he was a member. This was subsequent to the institution of this suit, which was commenced 12 September, 1871.

There was conflicting evidence as to whether, at the time of the sale of the "mill" tract on 4 November, 1867, the ferry was mentioned as being put up for sale with that tract, witnesses testifying both ways and contradicting each other.

The deed to D. N. Patterson was for the tract lying between the widow's dower, Robinson's line, and the river, containing about 200 acres, including the mill, factory and appurtenances, operatives' houses, islands, ferry and fishery.

It was in evidence that the report of sale was made by the administrators of S. H. Christian, to Spring Term, 1868, of Montgomery Superior Court, of the land sold on 14 November, 1867, in which was included the "mill" tract on the Montgomery side; that the report and decree of confirmation made at that term were for a time misplaced, and by leave of the Court another report and decree, supposed to conform to the original, were allowed to be substituted in their place. Afterwards the original report and decree were found (413) and restored, and it appearing that there was a variance between the original and the substituted record of report and decree, in this respect, viz., that the ferry at Swift Island was not mentioned in the original record, but was in the substitute, by order of the Court, the original report and decree was restored and the substitute stricken out. All this was done by order of the Superior Court of Montgomery County, after notice to the parties interested. The substituted report and decree were filed previous to the institution of this

suit; they were stricken out and the original record reinstated at Spring Term, 1874, of this Court.

The plaintiffs asked the Court to charge the jury that by their purchase of the "William Davis" tract, on the Stanly side of the river, they acquired the right to one-half of the ferry as appendant and appurtenant to that tract, they being owners to the thread of the stream.

His Honor declined to give the charge asked for, and charged the jury "that while the plaintiffs as riparian owners had a right to go to the thread of the stream, they could go no further under their deed; consequently they could not be joint owners of the ferry franchise, which necessarily extended to both sides of the river; that the plaintiffs had to recover upon the strength of their own title, and not upon the weakness of that of the defendants, and that upon the showing made they were not entitled to recover one-half of the ferry."

To this ruling the plaintiffs excepted, but in deference to the opinion of his Honor, submitted to a nonsuit and appealed to the Supreme Court.

Neill McKay, S. J. Pemberton and *J. W. Hinsdale,* for appellant.

M. J. Montgomery and *Bailey & McCorkle, contra.*

PEARSON, C. J. The plaintiff's case rests upon the ground that by the deed conveying to him the land on one side of the river, "with all the appurtenances thereto belonging," (414) he acquired title to one-half of the ferry. In other words, the ownership of the land on one side of the river draws to it one-half of the ferry. This proposition cannot be maintained. We concur with his Honor in the conclusion that the plaintiff did not make out a case.

It is true, where the right to a public ferry is annexed to a tract of land, as "appurtenant thereto," a conveyance of the land "with its appurtenances" passes the ferry; this is assumed to be the principle of law in *State v. Willis,* 44 N. C., 223, and in *Biggs v. Ferrell,* 34 N. C., 1. But in those cases the franchise of a public ferry was annexed and appurtenant to the land; whereas, in our case the franchise "to keep the ferry and receive the tolls," for aught that appears, is a right *"en gross"* like a right of common or an advowson *"en gross,"*

and has never been annexed to the land and made appurtenant thereto, either on the one side of the river or the other, or to the land lying on both sides of the river at the *termini* of the ferry.

The ferry was established by the Plank Road Company under the authority of an Act of 16 February, 1859, and was used in connection with the plank road and as a part thereof.

It is set out as a fact in the case: "The plank road having fallen into decay and being discontinued as a turnpike, one Christian, the owner of the land on both sides of the river, claimed the franchise of the ferry, and kept it up until his death." After his death the land, on one side of the river, was bought by the plaintiff, and the land on the other side of the river was bought by the defendant: the deeds to both being for the lands, together with "all the appurtenances thereto belonging," and the defendant has since claimed the ferry, and kept it up. The charter of the Plank Road Company may have been forfeited for non-use; but there has been no judgment, so far as the case discloses, by which the charter is vacated; so, according to facts before us, the Plank Road Company is still in existence, and is the owner of this ferry; and above all, there is no evidence that Christian ever acquired title to the ferry, or in any way annexed the (415) right to the ferry as an appurtenant either to the tract of land which he owned on the Stanly side or to the tract which he owned on the Montgomery side, or to both. So, for aught that appears, the title to the ferry is still in the Plank Road Company; and if it was acquired by Christian, it does not appear that he attached it as appurtenant to his land on the one side of the river or the other, or to both, or whether it was not kept by him as a franchise *"en gross."*

The plaintiffs did not prove title. No error.

PER CURIAM. Judgment affirmed.

SAMUEL L. LOVE v. WILLIAM JOHNSTON.

1. By a levy the property is vested in the Sheriff, and his title is transferred to the purchaser, whether the sale is public or private. If there is any surplus after satisfying the execution it belongs to the execution debtor, or his proper legal representative.

2. A tender of Confederate money in 1863, at its nominal value, in payment of a note due in 1857, is not a legal tender *for any purpose.*

3. A note given for the balance of the purchase money at an execution sale to the legal representative of the execution debtor, stands upon the same footing as other notes due without condition, and no demand for the payment of the same is necessary before suit.

(*Cowles v. Hayes*, 71 N. C., 230; *Mebane v. Mebane*, 66 N. C., 334; *Biggs v. Williams, Ibid.*, 427; *Davidson v. Elms*, 67 N. C., 228; *Terrell v. Walker*, 65 N. C., 91; *Ibid.*, 66 N. C., 244; *Wooten v. Sherrard*, 68 N. C., 331; *Bank v. Davidson*, 70 N. C., 118; *Penser v. Simpson*, 65 N. C., 498; *Gibbs v. Gibbs*, 61 N. C., 471; *Bryan v. Foy*, 69 N. C., 45; *McKenzie v. Culbreth*, 66 N. C., 534; *Wells v. Sluder*, 70 N. C., 55, cited and approved).

ACTION, to recover the amount of a note alleged to be lost, tried before *Cannon, J.*, Spring Term, 1874, of HAYWOOD.

On 21 March, 1857, the defendant made the note (416) sued upon payable to J. R. Love, the testator of the plaintiff, as guardian of one M. J. Commons, a lunatic, for $756.54. J. R. Love continued to be guardian of the said lunatic until his death in the fall of 1863. Early in 1864 the plaintiff, Samuel L. Love, became guardian of said lunatic, and so continued until about two years ago, it being prior to the commencement of this action, when his guardianship ceased. The plaintiff was also one of the executors of J. R. Love, the first guardian of the lunatic, as stated.

During the time he was the guardian of the said lunatic the plaintiff in his returns to the Probate Court charged himself with this note, as being the property of his ward. It was also shown by the records of the Probate Court, October, 1872, that the plaintiff while guardian had paid out for his ward more than the amount due on the note, relying, as he stated, to be reimbursed from the note. His ward went to Texas during the plaintiff's guardianship, and this note was the only property left in this State from which the plaintiff could be paid, and he, the plaintiff, had therefore appro-

priated it for that purpose. The plaintiff's payments for his ward were explained by no other evidence; nor was there other evidence than that stated as to the ownership of the note.

The note given by defendant was for the balance of the purchase money for two slaves, the property of the said M. J. Commons, the said lunatic, sold under the following circumstances, to-wit:

Three executions, *fi. fas.*, were issued against the said lunatic on 2 November and 2 December, 1856, one of which was in favor of the defendant, William Johnston, the three amounting in the aggregate to $1,113, and were returnable to the Spring Term, 1857, of Haywood Superior Court, which commenced 23 March, 1857. The *fi. fas.* were then returned with this endorsement on each: "Levied this *fi. fa.* on three negroes, Martha, William, and Peter, as the property of the defendant, 12 March, 1857. W. Green, Sheriff"; and on one of them was the following deputation, to-wit: (417) "W. Green, Sheriff of Haywood County, deputes W. W. Medford on these papers. 23 March, 1857, W. Green, Sheriff." There is no entry on either of said *fi. fas.* of any further disposition of said property, nor of any sale or satisfaction. These same entries are on the execution docket of said term.

Writs of *ven. ex.* issued from the Spring Term, 1857, dated 8 March, 1857, reciting the former levies and returns, and further that the Sheriff had not sold for want of time, and directing the Sheriff to sell the negroes levied on according to the exigencies of the writ.

The writs of *ven. ex.* were returned to Fall Term, 1857; the one in favor of the defendant being endorsed as follows: "Received my debt and interest, by the purchase of two negroes; William Johnston; and satisfaction. Plaintiff's receipt filed for his debt and interest. Received my fees and commissions. Pay into office $5.10. Attorney's receipt filed for his fees. W. Green, Sheriff." The other writs were returned satisfied and plaintiff's receipt filed. There was no return of sale, nor of satisfaction, other than the foregoing. The foregoing entries also appear on the execution docket.

One of the slaves, William, was sold at public auction and bid off by the defendant at the price of $1,051. It did not appear that Martha was sold at public sale, but it was shown that she was taken by defendant at a valuation fixed by two disinterested persons, viz., at $1,000. This was a few days before the sale. The Sheriff executed bills of sale for the negroes sold.

The defendant satisfied the judgments upon which the execution issued, and also satisfied some other debts of the said M. J. Commons, amounting in all to $1,294; for which sum the Sheriff gave him a receipt, reciting that it was received on executions paid by defendant. It is endorsed on this receipt in the defendant Johnston's handwriting, as follows: "Bid $2,037; debts $1,294."

The note sued upon for $756.74 was given for balance of purchase money of both of said slaves, after deducting
(418) the amount of the judgments, etc.

There was no evidence that the said J. R. Love was ever authorized by any order of the County or Superior Court to sell the property of his ward.

It was also proved that in the summer or fall of 1863 the defendant went into the house of the said J. R. Love, and informed him that he desired then and there to pay the note now in suit; that at the time he, the defendant, had a large amount of Confederate money with him, which he showed to the witness, but did not show it to J. R. Love. Love replied to this offer to pay, that he did not then have with him the note; that he was unwell, but that he would send the note over to the defendant, at Buncombe Court, in a few weeks. Upon this the defendant complained that the interest was accumulating, when Love told him if he did not send the note to Buncombe as promised, the interest thereon would cease from the time of said Buncombe Court. The note was not sent to Buncombe Court, but was retained by J. R. Love until he delivered it to the plaintiff, for safe-keeping, shortly before his death.

No proof was made of any demand on the defendant for the payment of the note before the commencement of this action, except that the defendant paid the plaintiff $376 on 1 January, 1867, which was allowed as a payment; and further,

that before the institution of this suit the plaintiff had claimed of the defendant the balance due on this note as a credit on a certain judgment which he, the defendant, held against the plaintiff and others; but this was not done, for the reason that the parties differed as to the amount then due on said note.

It was insisted for the defendant that the plaintiff was not the proper owner of the note, and had no right to sue for the same.

That the sales of the negroes, as before related, were not valid execution sales, but private sales by the guardian of said lunatic, without lawful authority; and that the consideration of the note and the note itself was unlawful, against public policy, and therefore void. (419)

That a tender was proved; but whether that is so or not, the agreement that the interest on the note should cease was a valid agreement, and a sufficient consideration; that by said promise the defendant was prevented from making a further tender, and thereby exposed to loss and inconvenience; that otherwise Love would be permitted to take advantage of his own wrong.

That after said tender and agreement a demand was necessary before the bringing of this suit.

The case being submitted to the jury, they found a verdict for the plaintiff. Motion for a new trial; motion overruled. Judgment, and appeal by defendant.

Coleman and *T. D. Johnson,* for appellant.
McCorkle & Bailey, contra.

BYNUM, J. 1. By the levy of the Sheriff the property in the slaves of the debtor was vested in him, and the title he made to the purchaser, whether the sale was public or private, was good, and after satisfying the executions the overplus of the purchase money was due to J. R. Love, the first guardian of Commons, the debtor ward. If the guardian saw fit to take a note from the purchaser for the overplus, instead of the cash, the defendant, for whose ease and favor it was done, cannot object; he got the property and owes the money. If the Sheriff committed a breach of his official duty in the manner of the sale, that is a matter between him and others, in which this defendant is no way concerned.

Upon the death of J. R. Love, the first guardian, the present plaintiff was appointed guardian, and was also the executor of the first guardian. He received this guardian note from the estate of J. R. Love, his testator, and by returning it as a part of the estate of his ward he fixed himself with the ownership in his rightful character of guardian. He, therefore, had the same ownership and right of action upon the note
(420) as the first guardian, just as an administrator *de bonis non* can, in his own name, sue upon notes made payable to the first administrator. *Cowles v. Hayes,* 71 N. C., 230.

The cases cited by the counsel of the plaintiff establish fully that when the plaintiff became guardian, received the note as such, and charged himself with it, he became the trustee of an express trust, and as such he was the owner of the note, at least for all the purposes of this action. C. C. P., secs. 55, 57. *Mebane v. Mebane,* 66 N. C., 334; *Biggs v. Williams, Ib.,* 427; *Davidson v. Elms,* 67 N. C., 228.

2. The note was executed in 1857, and was, therefore, not a Confederate debt. If the tender of payment had been in other respects sufficient, yet as it was made in Confederate money of the nominal value of the note, it was not a legal tender for any purpose. As this tender was made in "the summer or fall" of 1863, when that currency had become so depreciated as to be a notice to trustees not to receive it on well-secured ante-war debts, had the guardian then received it he would have violated his trust and incurred the risk of becoming personally liable for the full amount of the note. It was his right and duty, without resorting to any evasive pretexts for so doing, to refuse to receive the Confederate money; and no vague promise to deliver the note and receive the money, at a future time and place, or on his failure to do so, not to charge interest on the note from that time, was founded on a valid consideration, but was void. *Terrell v. Walker,* 65 N. C., 91; *s. c.,* 66 N. C., 244; *Wooten v. Sherrard,* 79 N. C., 334; *Bank v. Davidson,* 70 N. C., 118; *Purser v. Simpson,* 65 N. C., 397; *Gibbs v. Gibbs,* 61 N. C., 471; *Bryan v. Foy,* 69 N. C., 45; *McKenzie v. Culbreth,* 66 N. C., 534; *Wells v. Sluder,* 70 N. C., 55.

3. It follows that the note stood upon the same footing as other notes due and without conditions, and that no demand before suit was necessary. Whether the executors of the first guardian could pay the debts of the ward, by transferring this note to the plaintiff, who himself was one of these executors and the creditor of the ward, or whether the (421) plaintiff could apply the note or its proceeds to his own reimbursement, or whether he could expend more than the income of the ward's estate, are questions raised and discussed in the brief furnished us by Mr. Coleman, but they are questions which do not arise in this action. The plaintiff will be accountable to his ward for the proper management of his estate. The defendant will discharge himself by paying this note, which he justly owes, and the plaintiff and his former ward can then settle their matters as they may be advised. There is no error.

PER CURIAM. Judgment affirmed.

Cited: Koonce v. Russell, 103 N. C., 181; *Bank v. Comrs.,* 116 N. C., 362.

STATE on the relation of SARAH TIDLINE v. WILLIS HICKERSON.

Depositions are admissible in evidence on the trial of an issue in bastardy, as they are in other *civil* cases.

(*State v. Pate,* 44 N. C., 244; *State v. McIntosh,* 64 N. C., 607, cited and approved).

PROCEEDING IN BASTARDY, tried at Fall Term, 1874, of WILKES, before *Mitchell, J.*

On the trial of an issue as to the paternity of the child, the defendant offered in evidence the deposition of a witness who was too sick to attend the Court. The reading of the deposition was objected to by the Solicitor, which objection was sustained by the Court.

There was a verdict against the defendant. Judgment, and appeal.

Scott & Caldwell, for defendant.
Attorney-General Hargrove, for the State.

(422) RODMAN, J. We are not informed by the record for what reason his Honor rejected the deposition offered in evidence by the defendant. It is said here it was because he considered the proceeding a criminal one, in which depositions are not admitted. That a proceeding in bastardy is a civil action is settled by the cases of *State v. Pate,* 44 N. C., 244, and *State v. McIntosh,* 64 N. C., 607. The deposition was admissible.

PER CURIAM. Judgment below reversed and *venire de novo.*

Cited: S. v. Bryan, 83 N. C., 613; *S. v. Liles,* 134 N. C., 737.

PARIS S. BENBOW v. MARY A. ROBBINS and another.

Whether a trial of facts is by a jury or by consent, if it appears that the finding was influenced by misdirection or misconstruction of the law, a new trial will be granted by this Court on appeal. In such case the former trial goes for nothing, and if it has by consent of parties been tried by the Court, the second trial must be by jury unless there be a new agreement that the Court may try.

CIVIL ACTION, to recover damages for ponding water on plaintiff's land, tried at the Fall Term, 1874, of GUILFORD, before *Kerr, J.*

This case was before the Court at June Term, 1874, and is reported in 71 N. C., 338. It was sent back to be tried anew, and on the second trial the plaintiff had judgment. From this judgment defendants appealed.

All the facts relating to the points raised on the second trial will be found in the opinion of *Justice Reade.*

Dillard & Gilmer, Mendenhall & Staples and *Shipp & Bailey,* for appellants.
Scott & Caldwell and *Busbee & Busbee, contra.*

BENBOW *v.* ROBBINS.

READE, J. This case was before us at last term, reported in 71 N. C., 338. It then appeared that a jury trial had been dispensed with, and it was agreed that the Judge should find the facts and declare the law. The Judge found the facts for the plaintiff, viz., that the defendant had (423) ponded the water on the plaintiff's land; but did not find the damages, because he held that the defendant having so ponded the water for twenty years, from 1852 to 1872, she had acquired an easement, and therefore the plaintiff could not recover. From that ruling the plaintiff appealed, and we reversed his Honor upon the ground that, under our statute, time was not counted from 1861 to 1870, so as to bar the plaintiff's rights; and therefore the defendant was not protected. And we directed our opinion to be certified to the Court below, to the end that the case might be tried with that error corrected.

When the case went down, instead of trying it anew, his Honor held that the parties were bound by the finding of the facts at the former trial, which were in favor of the plaintiff, and gave judgment for the plaintiff, directing the defendant to take down her dam. This was error.

If the former trial had been by jury, we assume that his Honor would have charged the jury that it was not necessary for the defendant to controvert the plaintiff's allegation that she had flooded his land; for if she had done so she was protected by her twenty years' user. And so we assume that he instructed himself; and, therefore, it was not necessary for him to consider any evidence which the defendants did offer or which they might have offered upon the merits. And so the case has never been tried upon its merits.

Whether a trial of facts is by a jury or by the Court, if it appears that the finding was influenced by misdirection or misconception of the law, a new trial will be granted by this Court on appeal. And in such case the former trial goes for nothing. And where the first trial has, by consent of parties, been by the Court, the second trial must be by jury, unless there be a new agreement that the Court may try. There is error.

PER CURIAM. *Venire de novo.*

Cited: Isler v. Koonce, 83 N. C., 57; *Hickory v. R. R.,* 138 N. C., 317.

(424)

MOSES RANKIN v. JAMES B. MINOR, admr. of DANIEL J. DONNELL.

In proceedings supplementary to execution if the judgment debtor dies before the appointment of a receiver, or before the order of such appointment is filed in the office of the Clerk of the Superior Court, the property and effects of such judgment debtor do not vest in the receiver, nor has the judgment creditor any lien thereon as against the administrator of the judgment debtor.

(*Tate v. Morehead*, 65 N. C., 681; *Carson v. Oates*, 64 N. C., 115, cited and approved).

MOTION in proceedings supplementary to execution, to subject assets in hands of an administrator to debt due plaintiff, heard before *Kerr, J.*, Fall Term, 1874, of GUILFORD.

The plaintiff, a judgment creditor of Donnell, the intestate of defendant, instituted proceedings supplementary to execution against the said intestate on 10 February, 1871, and on the same day obtained an order for his, the intestate's, examination. On 16 February one J. W. Payne, according to the order of the Court, took the examination; and the fact was disclosed that Donnell, the intestate and judgment debtor, had recently become entitled to an interest in the estate of one J. M. Donnell, deceased, who was a minor. No further action was taken until 14 August, 1872, upon which day a notice issued to the defendant, as the administrator of Donnell, the judgment creditor, who had in the meantime, 2 August, 1871, died, to appear and show cause why he should not be made a party to the plaintiff's judgment and the supplementary proceedings.

At Fall Term, 1872, the defendant appeared, and the Court adjudged that he be made a party according to the notice; and further, that the plaintiff was entitled to have execution against him, as administrator, for his debts and costs, etc. At this same term the Court appointed the said J. W.
(425) Payne receiver of all the property, money and choses in action of the said Daniel J. Donnell, the intestate, at the same time ordering him to give bond in the sum of $1,000, with surety, for the faithful discharge of the duties, and file the same with the Clerk; and that upon filing such bond the said receiver should be invested with the property, etc., of the intestate. It was further ordered, that upon five

days' notice the said J. B. Minor, the defendant, as administrator of the judgment debtor, should appear and show cause why he should not deliver to the said receiver all the property belonging to his intestate. Minor qualified as an administrator 4 August, 1871.

The receiver filed no bond.

The defendant, Minor, by his counsel, appeared and showed for causes:

1. That the plaintiff had abandoned his supplementary proceedings;

2. That an administrator cannot be made a party to proceedings supplementary, begun against his intestate;

3. That the Court had no authority to appoint a receiver, as was attempted to be done in this case;

4. That the title to his intestate's personal estate vested in his personal representatives at his death, and his estate must be administered as directed by ch. 45, Battle's Revisal;

5. That the so-called receiver cannot call for the property until he has filed his bond as required by the order of the Court.

His Honor held that cause shown was insufficient, and that J. B. Minor account and deliver to J. W. Payne, receiver, all the estate of Daniel J. Donnell which had come to his hands.

From this judgment defendant appealed.

J. T. Morehead, Jr., for appellant.
Scott, contra.

RODMAN, J. Neither the order of the Court re- (426) quiring Daniel J. Donnell to appear and submit to an examination as to any property he might have, not subject to levy and sale under a *fieri facias*, nor his actual examination and the disclosure by him that he had an interest as distributee or otherwise in the estate of James M. Donnell, deceased, gave the plaintiff a lien upon that interest. It is provided by sec. 270, C. C. P., that such a lien shall be created by the appointment of a receiver, and by his filing a copy of the order with the Clerk of the Superior Court of the county where the judgment roll is filed. This was not done before the death of the judgment debtor, by which the action was abated so far, at least, that no lien could thereafter be acquired before the

death of the judgment debtor; it seems that then the property would go into the hands of the receiver for the satisfaction of the plaintiff's debt, and the surplus, if any, would be payable to the administrator of the debtor. The reason why, if the debtor dies before the property has become vested in a receiver as a trustee for the plaintiff's debt, no proceedings can be subsequently taken by which the plaintiff can obtain a lien or priority over other creditors, is, that the act of Assembly fixes unchangeably the distribution of the assets among the several classes of creditors at the death of the intestate. No diligence can change it. This principle governed us in the cases of *Tate v. Morehead,* 65 N. C., 681, and *Carson v. Oates,* 64 N. C., 115.

We think his Honor erred in requiring the defendant as administrator of Daniel Donnell to pay over his estate to the receiver.

PER CURIAM. Judgment reversed, and judgment that the defendant go without day.

Cited: Rand v. Rand, 78 N. C., 20.

(427)

STATE on the relation of E. S. P. LIPPARD v. JAMES C. ROSEMAN, admr., and others.

1. When an amendment lies within the discretion of the presiding Judge of the Superior Court, this Court will not review the exercise of that discretion.

2. Parties are entitled to a jury trial in all cases when they have not waived their right to demand it, *as they have in a reference by consent. S. c.*, 70 N. C., 34.

3. Where an administrator kept the Confederate money of his intestate "in a tin box promiscuously with his own private money of the same character, without package or label to distinguish it as a trust fund, and bonded it in the same indiscriminate manner, *taking certificates in his own name*, and kept no account of the respective amounts of the trust fund and his own private money thus bonded": *Held*, that he was responsible for the value of such Confederate money in the present currency, with interest from the time of its reception.

(*Cummings v. Mebane*, 63 N. C., 315; *Shipp v. Hettrick, Ibid.*, 329; *Lippard v. Roseman*, 70 N. C., 34, cited and approved).

ACTION upon the bond of defendant as administrator, heard by *Wilson, J.*, upon a motion to confirm the report of the referee, at Fall Term, 1874, of ROWAN.

The facts are stated in the report of the same case, at January Term, 70 N. C., 34.

On the last trial in the Court below, the defendants having given notice to that effect, upon the affidavit by one of the counsel, moved the Court to amend the records, *nunc pro tunc*, so as to show that the order of reference heretofore made was not by consent, but compulsory. This motion the Court refused; upon which the defendants excepted.

The defendants then moved the Court for a jury to try the issues arising in the referee's report. This motion was also refused by his Honor, and the defendants again excepted.

The case was then heard on the exceptions filed to the report of the referee by the plaintiff and defendants; and his Honor, after consideration, ordered and ad- (428) judged that the said exceptions be overruled and the report of the referee amended and confirmed. From this judgment the defendants appealed.

Bailey, for appellants.
Craige & Craige and *Jones & Jones, contra.*

SETTLE, J. The question of practice raised by the record was decided when the case was first before the Court, 70 N. C., 34.

And the main question has been repeatedly decided by this Court adversely to the views which are now passed upon the argument in behalf of the defendants. *Cummings v. Mebane,* 63 N. C., 315; *Shipp v. Hettrick, Id.,* 329.

The defendant Roseman sold nine slaves on 11 August, 1863, for Confederate money. If we admit that Confederate money was as good an investment as the slaves, which, however, is denied, as the hire of the slaves would have amounted to something, yet the defendant, after the disbursement of a small portion of said money, "kept the balance in a tin box promiscuously with his own private money of the same character, without package or label to distinguish it as a trust fund, and bonded it in the same indiscriminate manner, *taking certificates in his own name,* and kept no account of the respective amounts of the trust fund and his own private money thus bonded," and when testifying in his own behalf could not state whether he had invested in four per cent. certificates four or six thousand dollars of the money belonging to the Kelner estate.

There was no mark about this money to distinguish it from this other money, and, as is said in *Shipp v. Hettrick,* there never was such a separation of it from all other moneys in his hands as to make it cease to be his and become a part of the estate of his intestate.

How can the defendant claim to be in a better position than if he had made a general deposit of this money in bank, in his own name?

(429) We have held that in such case the defendant would not have been discharged from liability.

But we do not feel called upon to repeat the reasons upon which *Shipp v. Hettrick* was decided. They are, however, conclusive of this case.

PER CURIAM. Judgment affirmed.

Cited: Armfield v. Brown, 73 N. C., 82; *Dobson v. Chambers,* 78 N. C., 337; *Overby v. B. and L. Assn.,* 81 N. C., 62; *S. v. Warren,* 95 N. C., 676; *Sheldon v. Kivett,* 110 N. C., 411; *Driller Co. v. Worth,* 117 N. C., 519.

E. T. CHAMBERS v. H. L. BUMPASS, exr.

A testator in his will leaves to E. T. C. "all the residue of my estate, both real and personal, during her natural life or single state": *Held,* that E. T. C. was entitled to the use and enjoyment of the specific property so given, and that the executor had no right to intermeddle therewith, except to prevent a loss or unnecessary waste of the same.

ACTION to obtain a construction of a will, submitted without action, and heard by *Tourgee, J.,* at chambers, in PERSON, 25 July, 1874, upon the following case agreed:

I. John A. Bailey died in Person County aforesaid, on 30 May, 1874, leaving the following last will and testament, to-wit:

NORTH CAROLINA—Person County.

I, John A. Bailey, of the county and State aforesaid, being of sound mind and memory, but of feeble health, and know not how long my earthly existence can last, do make and declare this my last will and testament:

1. It is my desire that my body shall be decently (430) cared for and buried by the side of my mother.

2. I desire my executor to pay all my debts, burial and funeral expenses.

3. I leave to Elizabeth T. Chambers, my dear and near friend, all the residue of my estate, both real and personal, during her natural life or single state, and at the termination of either her death or marriage, I then desire all my property to be equally divided between my sister, Betsy Drumwright, W. H. Bailey, Thomas Bailey, and Nancy Harris's living children, share and share alike, except I only mean to give my sister Nancy Harris's children one-fourth of my estate, it being their mother's share.

4. I want my dwelling-house finished and paid for out of money I have on hand, and also the garden and yard paled in with the lumber I leave on hand; paid for as the house.

5. I desire my executor to see that my property is not wasted before the termination of the lease, so that my dear brothers and sisters may realize its value.

6. Should either my sister, Betsy Drumwright, William H. Bailey, Thomas Bailey, all or either of them, die before the termination of the lease to Elizabeth T. Chambers, then I want their lawful heirs to share their part of my estate, share and share alike.

7. I leave my worthy friend, Horace D. Bumpass, executor to this my last will and testament, and request him to execute the same. As witness my hand, etc.

II. That the said will has been duly proved in the Probate Court of Person County, and the defendant has qualified as executor thereto.

III. That Elizabeth T. Chambers, the plaintiff, is the identical person mentioned in the third paragraph of said will.

IV. That the testator, at the time of his death, was seized and possessed of a tract of land in Person County, and possessed of personal property consisting of money, cows,
(431) a horse, hogs, sheep, bonds, accounts, household and kitchen furniture.

V. That the defendant threatens to, and will, sell the aforesaid personal property, unless restrained therefrom by an order of this Court.

Wherefore, the parties pray the judgment of this Court, whether under the will aforesaid the defendant has the right to sell the personal property aforesaid, unless it should become necessary to do so to pay the debts of the testator.

His Honor thereupon gave the following judgment:

"Having considered the matters set forth in the case submitted, I am of the opinion that the defendant, as executor of the will of John A. Bailey, deceased, has no power or authority to deprive the plaintiff of the use and enjoyment of any part of the property whereof the testator died seized, except to prevent evident and unnecessary waste. This applies equally to the most perishable and most enduring of the property. The testator must be considered as fully understanding the nature and incidents of the property devised, as well as its amount. Knowing this, he devised this specific property to

the plaintiff for her life, for the loan is but a limited bequest, and she is entitled to the use and enjoyment of the property precisely as if there were no remaindermen, except that she has no power to sell and dispose of (except produce for her own support) nor waste the same. If it decays, wears out, or is consumed in the meantime, the executor is not liable, since the specific property is bequeathed in both instances, and not the proceeds or value thereof.

"It is therefore ordered, that the defendant desist and refrain from the sale of the property, unless the same be required by the wasteful conduct of the plaintiff."

From this judgment defendant appealed.

Jones & Jones, for appellant.
Smith & Strong, contra.

PEARSON, C. J. We concur in the opinion of his (432) Honor. No other construction can be put on the will.

It was the intention of the testator that the plaintiff should enjoy the use of his house, furniture, farming utensils specifically, "during her life or single state," and not that she should have the interest on what it would sell for. I give to my son a library for life, with limitations over after his death; the idea that the books are to be sold by the executor and my son is to have the interest of the purchase money during his life is absurd. So I give to my wife "the carriage and horses during her life or single state"; the idea of a sale by the executor is absurd.

The authorities cited by the counsel of the defendant as to residuary legacies have no application, for this is not a residuary legacy, but a *universal* legacy; that is, the plaintiff is to have the whole of his estate, after paying off the few debts which he owed, and funeral expenses. A sale of the household and kitchen furniture, etc., would entirely defeat the purpose of the testator.

If more was needed to show his intention, it is supplied by article 4, by which he directs his dwelling-house to be finished, and by article 5, by which he directs his executor to see that the property is not wasted, showing his intention to be that plaintiff should have the property specifically.

PER CURIAM. Judgment affirmed.

Cited: Bumpass v. Chambers, 77 N. C., 359; *Ritch v. Morris,* 78 N. C., 382; *Britt v. Smith,* 86 N. C., 307.

(433)

W. F. PHIFER and wife and J. H. WILSON v. THE CAROLINA CENTRAL RAILROAD COMPANY.

1. An appeal by a railroad company (the defendant) from the assessment of damages by commissioners appointed in pursuance of its charter, brings up the whole case into the Superior Court, where the parties can have every right relating to such damages adjudged and determined.

2. *Therefore*, a separate action involving the same rights will be dismissed with costs.

MOTION to dissolve an injunction, heard by *Logan, J.*, at chambers, in MECKLENBURG, 9 July, 1874.

The plaintiffs alleged in their complaint, supported by affidavits, that the defendant by running its road over their land was greatly endamaging them; that commissioners had been appointed to assess such damages, who did assess the same at $4,349.50, from which assessment defendant appealed to the Superior Court, only to gain time; and that the defendant's property was mortgaged for its full value, and they were likely to lose the amount so assessed. There are other facts stated in the complaint, not pertinent to the points raised in this Court. Plaintiffs prayed an injunction, etc., which was granted by *Judge Mitchell*, at chambers, 29 June, 1874.

Defendant gave notice that a motion to dissolve the injunction would be heard by *Judge Logan* on a certain day, and filed an answer substantially denying the material allegations in the complaint.

Upon the hearing, his Honor dissolved the injunction, and the plaintiffs appealed.

Wilson & Son, for appellants.
Battle & Son, contra.

SETTLE, J. This action must be dismissed. The appeal taken by the defendant from the assessment of damages by the commissioners appointed in pursuance of the char-
(434) ter under which the defendant is acting brought the whole case into the Superior Court, where the plaintiffs can have every right which they seek in this action adjudged and determined.

Public policy forbids the suspension of operations on works of internal improvement during the pendency of litigation to ascertain the damages to which parties may be entitled. But if the allegations of the plaintiffs, that the defendant has mortgaged its road for more than it is worth, be true, the defendant should be required to give security that it will pay to the plaintiffs such damages as may be finally assessed against the company.

This demand is so reasonable, especially since the company is authorized to mortgage its road to the extent of $25,000 per mile, that the refusal to comply with it at once gives ground for the suggestion of the plaintiffs that the defendant is seeking to avoid the payment of damages both now and hereafter.

PER CURIAM. Action dismissed.

Cited: R. R. v. McCaskill, 94 N. C., 752; *S. v. Jones,* 139 N. C., 621, 625.

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(435)

STATE on the relation of W. P. M. WELLS v. F. SLUDER and M. M. WEAVER, admr., and others.

An administrator who received on 11 May, 1863, Confederate money for a debt due the estate of his intestate, is chargeable only in the absence of fraud or bad faith, with the value of such money in present currency at the date he received it. Otherwise if the money was received so late in the war as to amount to a notice that the persons entitled to it would not receive it.

(*Shipp v. Hettrick,* 63 N. C., 329; *Cummings v. Mebane, Ibid.,* 315; *Emmerson v. Mallett,* 62 N. C., 234, cited and approved).

ACTION, heretofore before this Court, 70 N. C., 55, and sent back to the Superior Court of BUNCOMBE to have the judgment then appealed from modified, again heard before *Henry, J.,* at the Fall Term, 1874, of said Court.

The following statement, signed by the counsel, is sent to this term, as presenting the points for adjudication, or for the proper construction to be given to the decision heretofore rendered, to-wit, at January Term, 1874:

At Fall Term, 1874, of Buncombe Superior Court a judgment for $1,185.64 was obtained by agreement, in favor of the plaintiff against the defendant, subject to the opinion of the Court as to the legal effect of two credits claimed by the defendants, and which are fully set forth in the case agreed at that time, and which are reported in 70 N. C., 55. His Honor did not allow either of the credits claimed, and judgment was entered for the full amount, $1,185.64. From this judgment the defendants appealed.

At the January Term, 1874, of this Court this judgment, as before stated, was ordered to be modified according to the opinion of the Chief Justice filed in the case. On the last trial in the Court below the following facts relating to the second of the credits alleged and claimed by defendant's answer were agreed:

(436) On 11 May, 1863, the defendant F. Sluder, one of the administrators of R. P. Wells, deceased, met with one R. W. Patty, who owed his intestate, as guardian, a note executed, for a part of his ward's funds, prior to the war. Patty informed him, Sluder, that he wanted his note, and proposed to pay it in Confederate money, which Sluder declined to receive. Patty insisted that Confederate money was a legal tender, and, raising his hand, said: "I intend to have my note." Sluder, believing that the law required him to do so (having heard that *Judge Saunders* had recently charged the jury that it was an indictable offense to refuse Confederate money), received the money from Patty, and mixed it with other funds belonging to his intestate, receiving full credit for the same in his settlement with the Probate Judge. The plaintiff has never received any of said note.

If, upon the foregoing state of facts, the Court should be of opinion that the defendants ought not to be held responsible to the plaintiff for the amount of the Patty note, thus paid, and used by defendant Sluder, then the judgment at first obtained, as hereinbefore more fully set out, is to be credited with the amount of said note, to-wit, $155 in currency, at date of receipt, etc.

His Honor held that the defendants were only chargeable with the value of the Confederate money received from Patty at the date of its receipt, instead of the full (face) amount of the note, and gave judgment accordingly.

From this judgment plaintiff appealed.

T. D. Johnson, for appellant.
A. T. & T. F. Davidson, contra.

SETTLE, J. This is a case agreed, for the purpose of obtaining a proper construction of the opinion of this Court, rendered at January Term, 1874, in a case between the same parties, and reported in 70 N. C., 55.

The only question before us now is whether the defendants are to be charged with the value of the Confederate money received on the Patty debt at the date of its re- (437) ceipt, or with the full amount of the Patty note.

When the case was first before us this question was not discussed; indeed, it was not even suggested on the argument, and in rendering the opinion the Court was looking only to the general liability of the defendants, without adverting to the measure or extent of their liability. While the defendant Sluder, in yielding to the pressure brought to bear upon him, incurred a certain degree of responsibility, still we cannot say that he acted in bad faith or has been guilty of fraud.

And in the absence of fraud or bad faith this Court has by a long train of decisions, commencing with those cited by the defendants' counsel, *Shipp v. Hettrick,* 63 N. C., 329, and *Cummings v. Mebane,* 63 N. C., 315, established the position too firmly to be now shaken, that persons acting in a fiduciary character and receiving Confederate money are to be charged only with its value at the date of the receipt, unless it was received so late in the war as to amount to notice that the *cestui que trust* would not receive it. Here the money was received 11 May, 1863, and this Court after declaring that no inflexible rule can be laid down by which the liability of persons receiving Confederate money can be tested, but that each case must depend upon the circumstances attending it, says: "Probably it may aid investigation to say that, as a general rule, an officer might have received Confederate notes up to 1863, and ought not to have received them after 1863 upon ante-war debts, and that 1863 is debatable ground." *Emmerson v. Mallett,* 62 N. C., 234.

In this case, whether we consider the time of receiving the money or the circumstances attending it, we concur with his

Honor in the Superior Court that the defendant should be held responsible only for the value of the Confederate money he received from Patty.

PER CURIAM. Judgment affirmed.

Cited: Robertson v. Wall, 85 N. C., 289.

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(438)

GEORGE W. WILLOUGHBY v. THOMAS H. THREADGILL and another.

In a civil trial in the Court below the presiding Judge is the proper person to determine whether the jury has returned a verdict or only tendered one, and he may, in his discretion, in view of all the circumstances, discharge them or call them into the box again for the purpose of returning a proper verdict.

(*Houston v. Potts*, 65 N. C., 41, cited and distinguished from this; *Butts v. Drake*, 3 N. C., 262, cited).

ACTION to recover the value of a note, tried before *Buxton, J.,* and a jury, at the Fall Term, 1874, of ANSON, upon an appeal from a Justice's Court.

The note sued on was made payable to the plaintiff by defendants, for $140, and dated 29 May, 1862, due —— day of ——, 1862, the consideration being the rent of a blacksmith shop and tools, hire of a slave and board in 1862. The plaintiff alleged that this consideration was worth $140 in currency, and introduced evidence tending to prove it.

The evidence introduced by the defendant tended to prove that the consideration of the note was not worth $140.

His Honor instructed the jury that, inasmuch as the giving this note was a Confederate transaction, they must ascertain by their verdict what was the value of the consideration for which the note was given; that the legislative scale of depreciation was not applicable, as it was agreed that the note was not given for a loan of Confederate money.

While the jury were out making up their verdict the Court took a recess for dinner, and during the recess the jury rendered to the Clerk of the Court their verdict, to-wit: "In favor of the plaintiff for $140, without interest."

When his Honor resumed his sitting the verdict as rendered and entered by the Clerk was brought to the attention of the Court by the plaintiff's counsel, who expressed dissatisfaction therewith. The jury being in the court-room, his Honor directed them to take their places in the jury (439) box, and informed them that they had misconstrued the instructions of the Court, and had rendered a verdict which the Court was unwilling to receive; that they had nothing to do with the question of interest, and had no right to deprive the plaintiff of it; that the law gave interest as an incident to the note; and that they would please retire again and ascertain from the evidence what was the value of the consideration for which the note was given, so that the sum which was ascertained might be regarded as the principal of the note, instead of the sum stated in the note, to bear interest according to the tenor of the note.

To this proceeding and to the instruction given by his Honor, the defendants' counsel excepted; and insisted that the jury had in the first instance rendered such a verdict as they had a right to do; that it was a verdict proper in itself and was supported by the evidence, and that the judgment of the Court ought to be rendered in accordance therewith without further ado. Besides, the jury had discharged themselves of the case by rendering their verdict, and the Court could not recommit the case to them, although it might, by setting aside their verdict, commit the case to another jury.

His Honor, regarding the verdict as merely tendered to the Court, but not received by the Court, overruled the objection of the defendants, whereupon they excepted.

The jury having found the value of the consideration to be worth in good money $140, according to the face of the note, the plaintiff had judgment accordingly, with interest, etc.

From this judgment the defendants appealed.

Busbee & Busbee, for appellants.
Battle & Son, contra.

SETTLE, J. This case is somewhat like that of *Houston v. Potts,* 65 N. C., 41, differing, however, in some important particulars.

(440) 1. In *Houston v. Potts* we infer that the jury had dispersed and gone beyond the call of the Court, while in this case they were in the court-room when his Honor returned after a short recess.

2. In that case there was a question of fact as to whether the contract was made in North or South Carolina, and whether the interest would be six or seven per cent., while in this case no such issue was presented, the law fixing and giving interest as soon as the contract was ascertained. Without relying upon the authority of *Butts v. Drake,* 3 N. C., 262, we are of opinion that his Honor had the power when he returned into Court, after a short absence, and found the members of the jury still in the court-room, to call them into the box and tell them that the verdict they had tendered was not accepted by the Court, and that they must retire and make up a proper verdict.

While this course would not be admissible in criminal cases, we think a larger power may be safely allowed in civil actions, and that the Judge who presides and sees all the incidents of the trial is the proper person to determine whether the jury has returned a verdict or only tendered one, and that he may, in view of all the circumstances, discharge them or call them together again, in the exercise of a sound discretion.

There is nothing in the instructions of his Honor of which the defendants can complain.

PER CURIAM. Judgment affirmed.

Cited: Robeson v. Lewis, 73 N. C., 109; *Wright v. Hemphill,* 81 N. C., 35; *Petty v. Rousseau,* 94 N. C., 362; *Cole v. Laws,* 104 N. C., 657; *Mitchell v. Mitchell,* 122 N. C., 334; *Bond v. Wilson,* 131 N. C., 507; *S. v. Godwin,* 138 N. C., 586.

(441)

(1)

WILLIAM DAVIS v. THE BOARD OF COMMISSIONERS OF STOKES COUNTY and JOHN F. POINDEXTER.

(2)

WILLIAM DAVIS v. THE BOARD OF COMMISSIONERS OF STOKES COUNTY.

Where a late County Court borrowed money in 1862, without having any legal authority so to do, and the plaintiff became the county's surety on the bond for the borrowed money, a part of which he has since been compelled to pay under suit: *Held*, that such plaintiff had no right to call upon the County Commissioners of said county to reimburse him for the amount already paid, or to exonerate him from the payment of the balance due.

(*Poindexter v. Davis*, 67 N. C., 112; *Weith v. Wilmington*, 68 N. C., 112, cited and approved).

ACTIONS originally instituted in the Superior Court of Stokes County and thence removed to FORSYTH, and tried by *Wilson, J.*, at Fall Term, 1874.

The two suits 1 and 2, involving the same points, were agreed to be tried together by his Honor, without the intervention of a jury, who found the material facts to be:

1. That the county of Stokes, by her justices, a majority being present, at June Term, 1861, authorized the borrowing from the branch Bank of Cape Fear at Salem, $10,000, in four equal instalments of $2,500 each, on the bonds of the county, to be executed by their chairman and five associate justices, for the purpose of equipping four military companies, of which the Brown Mountain Boys was one.

2. The Court appointed an agent for each company to carry into effect the order, M. T. Smith being agent for the Brown Mountain Boys and William Flynt agent for the Town Fork Invincibles.

3. At their September Term, 1861, a majority of (442) justices being present, the Court authorized an additional $1,000 to be borrowed of the same bank for each of the companies.

4. The first instalment of $2,500 was drawn by the agent, M. T. Smith, as to a part thereof, to-wit, $325, and the balance by Milton Smith, the Captain of the Brown Mountain Boys, who paid the money to one Fries for cloth for the com-

pany, and filed his vouchers for such payment with M. T. Smith, the county agent. Only $500 of the $1,000 was applied by the agent himself for the use of the company.

5. Bonds of the county, signed by J. J. Martin, chairman, and by sureties, were executed for these sums severally, and the bond for the larger sum was several times renewed at the bank before payment.

6. At March Term, 1862, the justices, a majority present, authorized money to be borrowed from individuals to pay the debt due to said bank.

7. At the ensuing June Term of the Court the authority was renewed and money again authorized to be borrowed from individuals.

8. On 10 June, 1862, W. Flynt had executed a bond with security to John F. Poindexter, the defendant, in the sum of $3,050, for which the agent M. T. Smith received the money and sent it by Flynt to the bank, who paid the debt of $2,500 and the debt of $500, the bonds being produced in evidence.

9. Poindexter subsequently obtained a judgment in the Superior Court against Davis, the plaintiff in this action, and the other sureties, for the $3,050 loaned the county to pay the bank debt; of this recovery Davis has paid $500. After this payment Poindexter assigned his judgment to one James Davis.

10. Before Poindexter sued on his debt he presented the claim to the Board of Commissioners of Stokes County, who audited the same and allowed it.

The foregoing facts relate chiefly to the first case (1), but also pertain to the points raised in case No. 2, the second; to which his Honor also found the following additional facts:

(443) That Flynt, as the county agent of the other company, the Town Fork Invincibles, borrowed of said bank $2,500. This debt was paid by money borrowed of the plaintiff, William Davis, who knew all the circumstances attending the borrowing of the money from the bank and to what purposes said money was to be applied.

The case states that the plaintiff, on the trial before his Honor, abandoned his causes of action against the Board of Commissioners.

His Honor, upon the foregoing facts, adjudged: That the bank debts referred to were contracted by the county of Stokes for war purposes, in aid of the rebellion.

That the money obtained from the plaintiff Davis, and also that from Poindexter, was procured and used for an innocent purpose, which was neither calculated nor intended to aid the rebellion.

That the acts of the General Assembly under which the Justices of Stokes borrowed the money were passed expressly to aid the rebellion, and were therefore void, and conferred on the county no authority to borrow money for any purpose.

That the auditing Poindexter's debt by the County Commissioners on 3 January, 1870, did not place the county under a legal obligation to pay it.

And therefore the plaintiff cannot recover in either of his actions. Judgment accordingly, from which plaintiff appealed.

Dillard & Gilmer, Scales & Scales and *Shipp & Bailey,* for appellant.

Graves, contra.

READE, J. In *Poindexter v. Davis,* 67 N. C., 112, it was decided that a bond given for money loaned to pay off a debt which had been contracted in aid of the rebellion was not affected by the illegality of the original debt. In that case the County Court of Stokes County had borrowed money of a bank to equip soldiers for the Confederate service. That was, of course, illegal. The County Court subsequently borrowed money of Poindexter to pay off the bank (444) debt. And we held that the illegal consideration of the bank debt did not affect the consideration of the Poindexter debt. The County Court gave a bond to Poindexter for the money borrowed of him, and the present plaintiff Davis was a surety upon that bond; and the Poindexter suit was against him, and a recovery was had against him, and he has paid a part of the debt, and now seeks to compel the county of Stokes to reimburse him the amount he has paid and to exonerate him from the balance by the payment thereof by the county, upon the ground that the county is primarily liable.

There is no doubt of the rule that the principal is responsible to the surety for any liability incurred by the surety at the request of the principal. But that rule is subject to exceptions. A surety for an idiot, infant, *feme covert,* etc., may be

liable when the principals are not liable either to the obligee or to him. So a surety for a corporation in a transaction where the corporation has not the *power* to contract, may be liable when the corporation is not. And a corporation may exceed its powers where there is no moral turpitude: as a Board of County Commissioners contracting a debt to build a church, a very praiseworthy object; but still it is beyond their *power*, and *they* would not be bound, while their surety would be. Grant, then, that the borrowing of money of Poindexter by the County Court of Stokes County to pay the bank debt was not tainted with political turpitude, yet the County Court had no *power* to borrow the money or to give the bond. It may be true that there were statutes of a rebel Legislature which authorized it; but such statutes were void. But while the County Court had no power to give the bond, the plaintiff Davis had the power to do it; and there being no moral or political turpitude, he is bound by it. But when he calls upon the people of Stokes County to reimburse or indemnify him, they have the right to answer that he was not *their* surety;

(445) that the County Court was not *their* agent with power to contract that debt, and therefore they are not liable.

It may seem hard—it is hard—that the plaintiff should have to bear the whole burden of what was a common cause, and the "pomp and circumstance" of equipping soldiers for the field lost much of its glory when tarnished by the refusal to pay for it; but still there is no obligation which the courts of this government can enforce.

The principles governing this case are discussed more at large in *Weith v. Wilmington,* 68 N. C., 112, and in a number of cases in this Court within the last few years growing out of transactions in aid of the rebellion, to be found collected in 4 Bat. Digest.

The other branch of this case is governed by the same principles as are enunciated in this branch.

PER CURIAM. Affirmed.

Cited: Lance v. Hunter, ante, 179; *S. v. R. R.,* 74 N. C., 289; *Davis v. Comrs., Id.,* 375; *Brickell v. Comrs.,* 81 N. C., 243.

STATE v. C. W. BULLARD.

In an indictment under sec. 116, ch. 32, Battle's Revisal, for entering on the land of another and taking therefrom turpentine, etc., it is necessary that a "license so to enter" should be distinctly negatived as an essential part of the description of the offense.

INDICTMENT for entering on the land of the prosecutor and taking therefrom turpentine, tried before *Buxton, J.*, at the Spring Term, 1874, of RICHMOND.

Upon the trial in the Superior Court, exceptions were taken to the admission of certain evidence and to the charge of his Honor on certain points not necessary to set out in this report, as the case was decided in this Court upon the refusal of the Court below to arrest the judgment.

The substantial facts pertinent to the decision in (446) this Court are sufficiently stated in the opinion of the Chief Justice.

The jury found the defendant guilty. Motion in arrest of judgment; motion overruled, and appeal by the defendant.

Steele & Walker, for the defendant.
Attorney-General Hargrove, for the State.

PEARSON, C. J. The indictment is fatally defective in this: it does not allege that the defendant entered upon the land *"without a license therefor."*

The rule is, an indictment must set out every matter which is necessary in order to give a description of the offense charged. The offense created by the Act of 1866, ch. 61, to be found in Bat. Rev., ch. 32, sec. 116, is "an entry upon the land of another" after being forbidden to do so, and *"without a license therefor."*

So the fact of an entry, without a license therefor, is just as essential a part of the description as "after being forbidden to do so."

When the offense is complete without reference to a license, and the fact of a license constitutes merely an excuse or justification, the bill of indictment need not negative the license; but by this statute, in the *enacting clause,* it is made a part of the description of the offense; all of the authorities

are in accord upon this point, and it is not our duty to take the trouble to cite cases for the edification of those whose duty it is to draw indictments.

The suggestion of the Attorney-General, that "the license" referred to in the enacting clause is the license of the owner, and is sufficiently negatived by the averment, "after being forbidden to do so," is clearly a misapprehension. The reference is to the license, set out in the proviso, to be obtained from a justice of the peace, to search for stray cattle, etc. Error.

PER CURIAM. Judgment arrested.

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(447)

STATE v. JAMES DURHAM.

1. A temporary separation of a juror from his fellows under the supervision of the Court, that said juror may be examined as a witness in a case then pending, will not of itself vitiate the verdict returned after the juror returns to the jury-room.

2. In an indictment for felony (containing only one count), there cannot be a conviction for a minor offense included within such felony, if such minor offense be a misdemeanor. Therefore, in an indictment against A for rape he cannot under the same bill be found guilty of an assault and battery.

(*State v. Miller*, 18 N. C., 500; *State v. Tilghman*, 33 N. C., 573; *State v. Little*, 27 N. C., 58; *State v. Hester*, 47 N. C., 53; *Moore v. Edmiston*, 70 N. C., 471; *State v. Arrington*, 7 N. C., 571, cited and approved).

INDICTMENT FOR RAPE, tried before *Kerr, J.*, and a jury, at the Fall Term, 1874, of GUILFORD.

The prisoner was arraigned and found guilty on the following indictment:

STATE OF NORTH CAROLINA—Guilford County.

Superior Court, December Term, 1874.

The jurors for the State upon their oaths present, That James Durham of the county of Guilford aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the first day of August, in the year of our Lord one thousand eight hundred and seventy-four, with force and arms at and in the county

aforesaid, in and upon one Mary Lay, in the peace of God and the State then and there being, violently and feloniously did make an assault, and her, the said Mary Lay, forcibly and against the will of the said Mary Lay, then and there feloniously did ravish and carnally know, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

F. N. STRUDWICK, *Solicitor.*

On the trial below, after the evidence of the State (448) had been offered, his Honor was asked by the prisoner to instruct the jury that if they were not satisfied of the commission of the felony as charged, they might find the prisoner guilty of an assault and battery. This was refused, and the prisoner excepted.

After the case had been put by his Honor to the jury and they had retired to make up their verdict, and had had the same under consideration during a whole night, one of the jurors was called as a witness in a case then pending for the State; the witness left the jury-room and remained in the court-room a short time, till the case was disposed of, when he returned.

There was a verdict of guilty. Motion for a new trial; motion overruled. Judgment of death. Appeal by the prisoner.

Tourgee and *Gregory,* for the prisoner.
Attorney-General Hargrove, for the State.

BYNUM, J. 1. After the jury had been charged by the Court and had retired to consider of their verdict, it was made to appear that one of the jurors was needed in Court as a witness in a case then called for trial, whereupon the Court directed the juror to be brought from the jury-room, as a witness, and upon the case being continued, he was immediately returned to the jury-room. This temporary separation of the juror from his fellows, by the direction and under the supervision of the Court, does not vitiate the verdict, as has been determined by this Court in many cases. *State v. Miller,* 18 N. C., 500; *State v. Tilghman,* 33 N. C., 573; *State v. Lytle,* 27 N. C., 58; *State v. Hester,* 47 N. C., 53; *Moore v. Edmiston,* 70 N. C., 471.

2. The counsel of the prisoner asked the Court to charge the jury that if they were not fully satisfied of the prisoner's guilt of the rape, they might under the same indictment find him guilty of assault and battery. His Honor refused the instruction; in that he committed no error. No evi-
(449) dence is set forth from which this Court can see that the prisoner was entitled to such an instruction, even if in law the jury could render such a verdict. The indictment contains but a single count, that of the capital felony of rape.

The rule of common law is, that in an indictment for a felony there could not be a conviction of a minor offense included within it, if such minor offense be a misdemeanor; and this is the foundation of the rule that an acquittal of a felony is no bar to another indictment for the same act, charging it as a misdemeanor, and *vice versa.* 2 Hawk., ch. 47, sec. 6; 1 Chit. C. L., 251, 679; 1 Ld. Ray, 711; 3 Salk., 193. The same rule of the common law prevails in most of the States of the Union, though in some of them it has been altered by statute so that a conviction of a misdemeanor is allowed in cases where it is included in the higher offense charged. Whar. Crim. Law, sec. 400.

In North Carolina we have adhered to the common law. In *State v. Arrington,* 7 N. C., 571, the prisoner was indicted for horse-stealing, and the jury found as their verdict that "he was not guilty of the horse-stealing, but was guilty of trespass." Whereupon the Court ordered them to retire and reconsider the case and return a verdict of guilty or not guilty, in manner and form as charged in the indictment, and no more. The jury retired and soon returned their verdict, finding the defendant guilty of the felony charged in the indictment. Upon appeal to this Court it was held that the first verdict should stand, as it was a plain response of not guilty to the issue submitted, and the addition of the defendant having been guilty of trespass did not vitiate it. In delivering the opinion, *Taylor, C. J.,* said: "Had the first verdict been so rendered, the judgment would have been arrested; the rule being that a defendant cannot be found guilty of a misdemeanor on an indictment for felony." So

far as we are informed the practice in this State has been in conformity with this decision.

PER CURIAM. No error. (450)

Cited: S. v. Perkins, 82 N. C., 683; *S. v. Goldston,* 103 N. C., 326.

NOTE.—Under Laws 1885, ch. 68; Rev., 3268, there can now be a conviction of assault upon an indictment for any felony which includes an assault.

D. C. MAXWELL v. H. M. CALDWELL, admr., and others.

When a Judge below refuses to give a judgment prayed for (except in the case of his refusal to grant an injunction), no appeal lies to this Court.

ACTION to recover the amount of certain notes, and that certain land shall be charged with the payment of the same, heard before *Schenck, J.,* at the Fall Term, 1874, of CABARRUS.

No statement of facts is necessary in this case.

From the refusal of his Honor to give judgment on the pleadings, the plaintiff appealed.

Barringer, for appellant.
Montgomery and *Walker, contra.*

RODMAN, J. No appeal will lie from a mere refusal of the Judge to give a judgment prayed for (except in the case of his refusal to grant an injunction).

The Judge here gives no judgment.

PER CURIAM. Case remanded to be proceeded in according to law.

Cited: Capel v. Peebles, 80 N. C., 92.

(451)

MARGARET HENDERSON and others v. JOSEPH WALLACE and others.

One who was not a party to a former petition in equity for a sale for partition, is in no way affected by any decree or proceeding in it: *Therefore*, such party cannot bring an action by way of bill or review, to modify or vacate the decree made in such original action.

MOTION to vacate and set aside a decree, heard before *Moore, J.*, at the Special (July) Term, 1873, of MECKLENBURG Superior Court.

This action was brought by one who was rightfully entitled to a share of the land sought to be divided, under a petition for partition in 1860, in the former Court of Equity, but who was not nor never has been a party to the pleadings for the purpose of vacating or reforming the decree made in such original suit. For these reasons, sustained by *Justice Rodman* in his opinion, the Court below dismissed the plaintiffs' case, whereupon they appealed.

Wilson & Son, for appellants.
Barringer, Brown and *Dowd, contra.*

RODMAN, J. It seems clear that as Jane McCoombs was not a party to the bill in equity for the partition of the lands through a sale, she was in no way affected by any decree or procedings in it, and that therefore she is not at liberty to bring an action in the nature of a bill of review to vacate the decree. Her estate in the lands remains as it was before any decree for sale. She still owns one-seventh of the lands, and may enter into possession along with her co-tenants, or have any process which a co-tenant is entitled to for partition.

Probably, also, the Court, on her motion, would allow the original bill for partition to be amended by making her a party. What the effect of such an amendment might be on her interests, we are not called on to say.

The present action cannot be maintained.

PER CURIAM. Action dismissed.

Cited: Carter v. White, 134 N. C., 480.

(452)

W. F. WARD and others v. F. B. PARKS.

Where a plaintiff in an action of ejectment shows that the defendant was *not* in possession of the premises in dispute when the action commenced, he must be nonsuited.

(*Atwell v. McLure*, 49 N. C., 371, cited and approved).

EJECTMENT, tried before *Cloud, J.*, at August (Special) Term, 1874, of WILKES.

The following are the substantial facts, as agreed and signed by the counsel of the contesting parties:

The plaintiff introduced a grant and deeds which he alleged covered the tract of land described in his complaint, and offered testimony tending to show that they did cover said land. He then proved that after the bringing of this action the defendant caused a small tract of land, within the boundary of the above-said described tract, to be run off by a surveyor, and marked one of the corners, and some trees along the line of said smaller tract; that he then forbid plaintiff to come on said smaller tract, and claimed it as his own. That the plaintiff had before that time held possession of said smaller tract, all of which was woodland, except a small corner of a field which extended into said land. That plaintiffs, ever since they were so forbidden, had kept off said small tract of land.

It was also in evidence that at some time before the bringing of this action a jury had gone on the land, at whose instance or under what authority did not appear, and had given the said small tract of land to the defendant, and that tenants of defendant, who lived on other land not far off from the disputed land, at various times got firewood, rails and board timber on said small tract of land, whether by the knowledge of defendant or not does not appear.

Defendant, by his answer, denied that he was in possession of the disputed land. After the testimony was closed the defendant's counsel suggested to his Honor that plaintiff had failed to prove the defendant in possession (453) of any part of the land in dispute, and his Honor remarked that he should instruct the jury that plaintiff had failed to do so.

Upon this intimation of his Honor, the plaintiff submitted to a nonsuit, and appealed to the Supreme Court.

No counsel in this Court for appellant.
Furches, contra.

SETTLE, J. In ejectment, the plaintiff is bound to prove the defendant in possession of the premises which he seeks to recover.

To this general rule there are some exceptions, which we need not notice here, as none of them embrace the case under consideration. They may, however, be found stated with great clearness in *Atwell v. McLure,* 49 N. C., 371.

The defendant denies in his answer that he was in possession of the disputed land; and the evidence of the plaintiff failed to prove that the defendant was then, or ever had been, in possession of the same. The evidence of the plaintiff is suicidal.

The first shows that after the commencement of this action the defendant had a small boundary of woodland within his, plaintiff's, larger boundary, run off and marked, and then forbid him, plaintiff, to come on the said smaller tract.

But the plaintiff then shows that before that time he held possession of the said smaller tract. So, by the plaintiff's own proof, the defendant was not in possession of the disputed land when this action was commenced.

The plaintiff then introduced evidence to show "that at some time before the bringing of this action, a jury had gone on the land, at whose instance or under what authority, did not appear, and had given the said small tract of land to the defendant; and that tenants of the defendant who lived on other land not far off from the disputed land, at various times got firewood, rails and board timber on said small tract of land, whether by the knowledge of defendant or not,
(454) did not appear."

Where this jury came from, at whose instance they came, under what authority they acted, how long was it before the commencement of this action that they gave "the said smaller tract of land" to the defendant, and yet left the plaintiff in full possession of the same, and how much the defend-

ant knew of some of his tenants getting rails, etc., on the said smaller tract, are questions for the curious to determine.

It is sufficient for our purposes to say that until these, or some more pertinent inquiries are determined, the plaintiff will not be entitled to a judgment against the defendant.

PER CURIAM. Judgment affirmed.

WILLIAM LATHAM v. HENRY H. ROLLINS.

An action by a sheriff against one of his deputies for failing to take bail upon a *capias ad respondendum*, whereby the Sheriff had to pay $176 as special bail, is founded upon an implied contract of which the Superior Court had no jurisdiction, the amount demanded being under $200.

(*Winslow v. Weith*, 66 N. C., 432; *Frœlich v. Express Co.*, 67 N. C., 1, cited and approved).

ACTION by a sheriff against his deputy for a misfeasance in office, tried at the Spring Term, 1874, of ASHE, before *Mitchell, J.*

The substantial facts are fully set out in the opinion of *Justice Bynum.*

On the trial below the plaintiff had judgment, from which defendant appealed.

Folk & Armfield, for appellant. (455)

No counsel *contra* in this Court.

BYNUM, J. A writ of *capias ad respondendum* was issued from the Superior Court of Ashe against one Oliver, and placed by the Sheriff in the hands of the defendant, his deputy, to execute and return. The defendant served the process, but failed to take bail, and Oliver fled the country. The plaintiff in the action proceeded to judgment and execution against Oliver, and on the return of the execution, "Nothing to be found," brought his action against the Sheriff as special bail, and recovered judgment for $176, the amount of the judgment, interest and cost recovered against Oliver. Having paid the judgment, the plaintiff, the Sheriff, brought this

action against the defendant, his said deputy, to recover the said sum. Has the Superior Court jurisdiction? The action is not in *tort,* but on the implied contract of the deputy, arising out of his office, to repay to his principal any sum that he might have to pay by reason of the default of the deputy. In this case the relief prayed is to recover the sum of $176, the amount which had been recovered of the plaintiff as special bail. There are two decisions of this Court in point, and decisive of this case. *Winslow v. Weith,* 66 N. C., 432, was where an action was brought in the Superior Court to recover $152 illegal excess of taxes paid by the plaintiff to the Sheriff under protest. A demurrer to the jurisdiction was sustained. *Frœlich v. Express Company,* 67 N. C., 1, was where the plaintiff alleged that he had delivered to the Express Company an article valued at less than $200, and averred its loss by negligence and demanded judgment for a sum over $200, by way of damages. The Court then held that the action was on contract, and that the Superior Court had no jurisdiction under the Constitution, Art. IV, sec. 33, and that this would be so even if the complaint had been in tort, in one of that class of cases where, prior to The Code, the plaintiff could have elected to declare in either tort or contract.

(456) That question, however, does not arise here, because the complaint is in contract and for a less sum than $200. There is error.

PER CURIAM. Judgment reversed and action dismissed.

Cited: Powell v. Allen, 103 N. C., 49.

J. S. HEATH v. W. A. BISHOP.

A defendant whose land has been sold by the Sheriff under an execution issuing without proper authority, and who has been dispossessed by the purchaser at the Sheriff's sale, under summary proceedings before a justice, has a right to have a writ of restitution and to be put into the possession of his land so sold.

(*Perry v. Tupper*, 70 N. C., 538; and *same case*, 71 N. C., 380, cited and approved).

ACTION, originally commenced before a justice of the peace and carried by a *recordari* to the Superior Court of TRANSYLVANIA County, where it was tried before *Cannon, J.*, at Fall Term, 1874.

The facts are substantially the following:

A judgment was obtained by the plaintiff against the defendant on 22 May, 1871, for $11.22, which was docketed and thus became a judgment of the Superior Court, 12 August, 1871. Execution issued thereon to the Sheriff of Transylvania, who levied it upon the land of the defendant, and sold the same at public sale, at which sale the plaintiff became the purchaser, taking a deed from the Sheriff.

The defendant refusing to deliver up the possession, the plaintiff, under sec. 31, ch. 156, Acts of 1868-'69, instituted summary proceedings before a justice of the peace of the county for possession. At the trial the defendant denied the right of the plaintiff to recover, but offering no evidence, the Justice gave judgment against him. From this judgment defendant prayed an appeal, paid the Jus- (457) tice his fees for such appeal and deposited a bond with the Clerk of the Superior Court. The record was sent up by the justice of the peace to the Superior Court, but the Clerk of that Court, not having received his fees, declined to enter the appeal on his docket, and returned the papers to the magistrate.

As grounds of appeal, the defendant relied upon defects in the original summons, the fact that the judgment was for a less sum than $25, and therefore, he insisted, could not be docketed, and for want of jurisdiction. The defendant offered no evidence attacking the validity of the first judgment or the regularity of the Sheriff's sale under the same, which

was admitted, with the exception of the right to docket the justice's judgment for $11.22.

The Justice issued a writ of possession upon the return of the papers to him, and ousted the defendant, who at once petitioned for a writ of *recordari,* which was granted. Upon the return of the writ, and the cause coming on to be heard, his Honor, ordering the case to be docketed, reversed the justice's judgment and directed that a writ of restitution issue. From this judgment the plaintiff appealed.

M. E. Carter, for appellant.
A. T. & T. F. Davidson, contra.

READE, J. In *Perry v. Tupper,* 70 N. C., 538, and in the same case, 71 N. C., 380 and 385, it was decided that a party put out of the possession of land by an abuse of the process of law is entitled to a writ of restitution as a matter of course, unless some new matter has intervened in the meantime. And that is decisive of this case.

PER CURIAM. Judgment affirmed.

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(458)

STATE v. PLESS GAITHER.

1. In the trial of a defendant for larceny a charge from the Court that the jury must find that the defendant took the property alleged to be stolen "with a felonious intent," and that "the question of intent had been fully discussed by counsel, and it was a question for them to decide," without at the time explaining to the jury what is meant by a "felonious intent," is error, and entitles the defendant, if convicted, to a new trial.

2. The question of what is meant by a "felonious intent" is one for the Court; its existence at a particular time is for the jury to say.

INDICTMENT, larceny, tried before *Schenck, J.,* at Fall Term, 1874, of CABARRUS.

The defendant was charged with stealing Mrs. Mary Groner's chickens, and on the trial in the Court below the following facts were established:

The defendant lived with a Mr. Litaker, whose premises adjoined those of Mrs. Groner, the prosecutrix. She, Mrs.

Groner, had a flock of some twenty or more chickens, and about 1 March her chickens began to disappear, one and sometimes two at a time. About this time she noticed a trap or box near Litaker's hog-pen.

Early one morning the defendant brought two chickens to Litaker's cook to clean, saying that he believed that they were Mrs. Groner's chickens. Mrs. Litaker claimed the chickens, and told the cook to clean and cook them, which the cook did, and the chickens were eaten at Litaker's table. The defendant said he had caught them in a box which he had baited. He was seen to take the chickens from the trap and convey them towards the house, by a neighbor, whose attention was directed towards the place by the squalling of the chickens. The chickens troubled Litaker's garden, who told defendant to catch them.

On the trial his Honor charged the jury that they could not convict the defendant unless they were satisfied that the chickens stolen were the property of Mrs. (459) Groner, and that the defendant took them with a felonious intent. That the question of intent had been fully discussed by the counsel, and it was a question for them to settle upon all the testimony. Defendant's counsel asked the Court to charge the jury that if defendant took the chickens under Mrs. Litaker's order, for her, or to keep them out of the garden, he was not guilty.

The Court in response told the jury that if defendant took the chickens with the intent to deprive Mrs. Groner of them, that he was guilty, no matter whether Mrs. Litaker ordered it or not; that the jury were the sole judges of the intent with which the taking was done.

A verdict of guilty was rendered by the jury. Judgment; appeal prayed and granted.

Montgomery, for defendant.
Attorney-General Hargrove, for the State.

READE, J. The facts stated produce a strong impression on our minds that the defendant ought not to have been convicted. He lived in Litaker's family, and both Litaker and his wife told him that the chickens were disturbing the garden, and that he must catch them; and they claimed the

chickens as their own. The defendant did catch them in the daytime, when they were "squalling," and carried them to Litaker's kitchen and gave them to the cook; and Mrs. Litaker ordered them to be cooked; and they were cooked, and were eaten at Litaker's table. The only fact that tends to show evil conduct on the part of the defendant is that he told the cook that the chickens resembled Mrs. Groner's, and he believed they were hers. The jury, however, convicted him, and their verdict must stand unless we can see some error in law or legal inference upon the trial. We think there was such error.

His Honor charged the jury that before they could convict, they must find that the defendant took the chickens "with a felonious intent." That is true; but what is a felo-
(460) nious intent was the question, and he ought to have explained that to the jury; but instead of doing so, he continued his charge, "that the question of intent had been fully discussed by counsel, and it was a question for them to settle."

Now, that was not a question for them to settle. What is meant by felonious intent is a question for the Court, and after the Court defines that, then it is for the jury to say whether he had such intent. But here the counsel disputed and "fully discussed"—the defendant's counsel, as we may suppose, insisting that there must be *clam et secrete,* and the State's counsel insisting that secrecy was not necessary; and his Honor leaves it to the jury to say which of the lawyers is right.

There was not only error in omitting to charge as above, but there was error in a subsequent part of his charge in response to the prayer of defendant's counsel. His Honor charged, "that if the defendant took the chickens with the intent to deprive Mrs. Groner of her property (or ate them) he was guilty," etc. It cannot be maintained, that if one takes the property of another and eats it, that he is guilty of larceny. It may be trespass, or mistake, or larceny, according to circumstances; it is not *necessarily* larceny.

PER CURIAM. *Venire de novo.*

Cited: S. v. Coy, 119 N. C., 903; *S. v. Journigan,* 120 N. C., 569; *S. v. Clark,* 134 N. C., 709.

(461)

STATE v. ANDREW SCOTT.

In an indictment for an assault with intent to commit a rape, the omission of the word "feloniously" in the description of the offense is a fatal defect.

(*State v. Johnson*, 67 N. C., 55, cited and approved).

INDICTMENT for an assault with intent to commit a rape, tried before *Henry, J.*, at Fall Term, 1874, HALIFAX.

The defendant was tried and convicted on the following indictment, to-wit:

NORTH CAROLINA—Halifax County.

Superior Court, Fall Term, 1874.

The jurors for the State upon their oath present, That Andrew Scott, late of Halifax County, on the second day of November, 1874, with force and arms, at and in the county aforesaid, in and upon one Julia Pittman, in the peace of God and the State then and there being, violently and feloniously did make an assault, with intent her the said Julia Pittman, against her will, then and there to ravish and carnally know, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State.

HARRIS, *Solicitor.*

The counsel for the defendant moved the Court to arrest judgment on account of defects in the indictment. The motion was overruled, and the defendant appealed. The grounds of objection to the bill are fully set forth in the opinion of the Court.

Day and *Walter Clark,* for defendant.
Attorney-General Hargrove, for the State.

(462)

SETTLE, J. The defendant having been convicted on an indictment charging him with an assault upon one Julia Pittman with intent to commit rape, moved in arrest of judgment for alleged defects in the bill of indictment. It is only necessary to notice one of the alleged defects, as that is fatal to the bill.

"That the indictment should have charged the assault, with *intent,* etc., *feloniously* to ravish and carnally know." Whereas, the word *feloniously* is omitted, where it is necessary to characterize the act of ravishing.

It is true the *assault* is charged to have been violently and feloniously made; but this essential word, *feloniously,* which cannot be supplied by any paraphrasis, is omitted in the important place where it is necessary to characterize the crime.

An assault may be made not only with the intent to commit rape, but other felonies: murder, for instance; hence, we cannot refer the word *feloniously* to the crime, when it is only used to qualify the assault.

Mr. Archbold gives the following form of an indictment for assault with intent to commit a rape:

"That, etc., in and upon one A. N., in the peace of God and our lady the Queen then and there being, did make an assault and her, the said A. N., did then and there beat, wound and ill-treat, with intent her, the said A. N., violently and against her will feloniously to ravish and carnally know," etc. And Bishop, in his work on Criminal Procedure, at sec. 560, in commenting on this form, says: "There is no reason to suppose that in an indictment for this form of the attempt to commit a rape it is necessary to specify the particulars of the assault. But the allegation of the intent should be such as to show that the offense intended to be committed would amount in law to rape. Therefore, where the indictment charged an assault, then added, "with intent to ravish and car-
(463) nally know the said Margaret Bolen," setting out also a battery, it was held to be insufficient. The Court observed: "This is a good indictment for assault and battery, but nothing more."

This is our case, with the exception that the indictment here does not set out a battery.

In *State v. Johnson,* 67 N. C., 55, where the words "forcibly," "violently," "and against her will," are commented upon and explained, the point was, that the indictment did not charge that the prisoner did *forcibly* and feloniously ravish, but that he did "feloniously ravish," omitting the word *forcibly,* but inserting the words "against her will."

There the indictment was held to be good, because the word "feloniously," as well as the words "against her will," characterized the act.

PER CURIAM. Judgment arrested.

Cited: S. v. Goldston, 103 N. C., 325; *S. v. Marsh,* 132 N. C., 1002.

HENRY J. HERVEY v. JOHN DEVEREUX.

Where A made a general deposit of a sum of money with B, and afterwards brought an action against him to recover the money, to which B pleaded his discharge in bankruptcy: *Held*, that such deposit did not come within the exceptions preventing a discharge, embraced in sec. 33 of the Bankrupt Act.

(*Williamson v. Dickens*, 27 N. C., 257, cited and approved).

ACTION, begun at Spring Term, 1872, HALIFAX, and tried at January (Special) Term, 1874, before *Henry, J.*, upon the following case agreed:

At Spring Term, 1867, of the Superior Court of Halifax County one Thomas Fitzpatrick was appointed and duly qualified as Clerk and Master of the Court of Equity for said county. (464)

At the date of said appointment the sum of eight hundred and forty-one dollars belonging to the office of said Clerk and Master was in the hands of McMahon & Devereux, a firm of merchants doing business in the town of Halifax, and of which firm the defendant, John Devereux, was a member, John H. McMahon being the other partner. This money had originally been deposited with said firm for safe-keeping in their iron safe, by the predecessor in office of the said Fitzpatrick, and the said firm having used said money for the purpose of their business and reported such to the said predecessor, he assented thereto and agreed that they might continue to use such money upon condition that it should be repaid whenever needed. At that time the said firm was in good credit.

Upon a settlement by the said Fitzpatrick with his said predecessor, the said Fitzpatrick refused to receipt for the said money until the said money should be repaid. At said settlement the money was not actually counted out, but upon being assured by one Michael McMahon that all the money was on hand, he receipted to his said predecessor for the same and allowed it to remain in the possession of the said McMahon & Devereux, taking from them the following paper-writing:

Received of T. Fitzpatrick, Clerk and Master in Equity for the county of Halifax, State of North Carolina, eight

hundred and forty dollars, being the same received by him of T. N. Hill in the case of *J. W. Tatem v. J. H. Everett and Hill and Anthony,* which we are to return upon application.

McMAHON & DEVEREUX.

Halifax, 25 October, 1867.

This was not intended by the said Fitzpatrick to be a loan to the said firm, but the defendant, who was the financial manager of the said firm, regarded the said receipt as giving him the right to use the said money upon condition of (465) its being returned upon demand.

Part of said sum having been demanded of the said firm by the said Fitzpatrick, for the purpose of being paid over to the persons entitled thereto, three hundred and eighty dollars thereof was paid and delivered to the said Fitzpatrick, who indorsed upon the said receipt the following acknowledgment:

Received on the within, the sum of three hundred and eighty dollars, and paid to order of the Court, in the case of *Anthony v. Hill.*

T. FITZPATRICK, C. M. E.

The remainder of said sum having thereafter been demanded by the said Fitzpatrick, for the purpose of being paid to the persons entitled thereto, and the said McMahon & Devereux having failed to pay and deliver the same in compliance with said demand, suit was brought therefor against the said Fitzpatrick and the sureties to his official bond as Clerk and Master aforesaid, and judgment having been obtained, the plaintiff, one of said sureties, was compelled to pay and did pay, on 11 December, 1871, in order to make good the remainder of said sum failed to be paid and delivered by the said McMahon & Devereux as aforesaid, the sum of six hundred and seven dollars. The said Fitzpatrick and the other sureties to his said official bond were at that time, and at the time of said last-mentioned demand, insolvent.

This action is brought by the plaintiff to recover of the defendant the sum paid by him as aforesaid. The defendant admitting his original liability, pleads in bar of the action his discharge in bankruptcy, granted him on 18 May, 1870, under an act of Congress establishing a uniform system of bank-

ruptcy throughout the United States, discharging him from all debts and claims which by said act are made provable against his estate, and which existed on 28 May, 1869, the date of filing his petition in bankruptcy, excepting such debts, if any, as are by said act excepted from the (466) operation of a discharge in bankruptcy.

The plaintiff never proved, nor attempted to prove, his claim in the bankruptcy proceedings of the defendant.

Upon the case agreed, his Honor gave judgment against the plaintiff for costs, from which judgment the plaintiff appealed.

Moore & Gatling and *Conigland,* for appellant.
Badger, Hill and *Devereux, contra.*

SETTLE, J. If the facts in this case do not establish a loan of money to McMahon & Devereux, they certainly make a case of a regular deposit, which authorized the firm to mix this money with their other moneys and use it as their own until applied for by the depositor. It seems to us that the transaction can receive no other reasonable construction.

This money originally came to the hands of McMahon & Devereux, a firm in credit, as a special deposit, to be kept in their iron safe; but they having used it, reported the fact to Mr. Hill, the depositor, when he assented thereto and agreed that they might continue to use the money, upon condition that it should be repaid whenever needed.

When Fitzpatrick succeeded Hill as Clerk and Master, he did not require his predecessor to collect this money and pay it over to him, nor did he require McMahon & Devereux to count it out, so that he could separate it from their moneys, put it into a package and make a special deposit of it in their iron safe; but he contented himself with the assurance that the money was all on hand, and gave his predecessor a receipt for the same, and took from the firm of McMahon & Devereux the following paper: "Received of T. Fitzpatrick, Clerk and Master in Equity for the county of Halifax, State of North Carolina, eight hundred and fifty-one dollars, being the same received by him of T. N. Hill, in the case of *J. W. Tatem v. J. H. Everett and Hill and Anthony,* which we are to return upon application." That Fitzpatrick regarded this

transaction as one authorizing McMahon & Devereux
(467) to handle this money and treat it as a general deposit, is established beyond doubt by the fact that when three hundred and eighty dollars of the amount was needed to comply with orders of the Court, Fitzpatrick did not call for his special deposit and take therefrom that sum, but he demanded payment of McMahon & Devereux, and when they did pay out of their general moneys, he made the following indorsement on the paper they had given him, to-wit: "Received on the within, the sum of $380," etc. The paper called "the within" was evidently the security to which he then looked, and the idea of a special deposit had not at that time entered his head. The defendant, admitting his original liability, pleads in bar of this action his discharge in bankruptcy. To which the plaintiff replied "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act." Sec. 33, Bankrupt Act.

The Bankrupt Act is a statute of repose, highly remedial in its character, and should be liberally construed. But if sec. 33 be strictly construed and applied in its utmost rigor, it cannot embrace, under any of its heads, the case before us.

The defendant was not a public officer, nor was he acting in a fiduciary character. *Williamson v. Dickens,* 27 N. C., 257; *Cronan v. Cotting,* 104 Mass., 245; *Grover v. Clinton,* 8 Nat. Bank. Reg., 312.

Admitting that the use, by the defendant, of the special deposit made by Hill would have amounted to fraud or embezzlement within the meaning of the Bankrupt Act, yet that was condoned by Hill, and express permission given by him to the firm to use the money until demanded.

And as we have already seen, such continued to be the contract between Fitzpatrick and the firm of McMahon & Devereux until the defendant became insolvent.

PER CURIAM. Judgment affirmed.

Cited: Dunn v. Johnson, 115 N. C., 257.

(468)

STATE v. GABRIEL BATCHELOR.

Ch. 176, Acts of 1873-'74, enlarging the jurisdiction of justices of the peace, does not embrace the offense of forcible trespass.

(*State v. McAden*, 71 N. C., 207, cited and approved).

INDICTMENT, forcible trespass, tried at Fall Term, 1874, of HALIFAX, before *Henry, J.*

When the case was called in the Court below it was moved for the defendant to quash the indictment for want of jurisdiction. His Honor allowed the motion, whereupon Solicitor Harris appealed.

Attorney-General Hargrove, for the State.
Batchelor, for the defendant.

BYNUM, J. This is an indictment against the defendant for a forcible trespass. When the action came on for trial in the Court below, the counsel for the defendant moved the Court to dismiss for the want of jurisdiction, and the motion was allowed and the action dismissed; from which judgment the Solicitor for the State appealed to this Court.

We are at a loss to discover upon what ground his Honor proceeded, as none is assigned by him or suggested here. The offense charged is one at common law, and the Superior Courts of this State have always exercised the jurisdiction here claimed. *State v. McAden*, 71 N. C., 207. The late acts of the General Assembly, increasing the jurisdiction of justices of the peace, Acts 1873-'74, ch. 176, do not embrace this offense, even if the conditions upon which that jurisdiction can be exercised are complied with. There is error.

PER CURIAM. Judgment reversed.

(469)

STATE v. G. W. CUNNINGHAM.

1. Where, upon the trial of an indictment for murder, a juror related to the prisoner was passed by the State, the Solicitor being ignorant of such relationship, and upon being tendered made known the relationship himself before being sworn: *Held*, that it was not error for the Court to stand such juror aside until the panel was completed.

2. Where a prisoner relies upon the plea of insanity, but there is no evidence whatever that he had ever exhibited any sign of insanity, evidence tending to show that some of his uncles and aunts were insane is inadmissible.

3. Sec. 115, ch. 31, Rev. Code, relating to the removal of causes, not being digested nor brought forward, is not repealed by sec. 2, ch. 121, Bat. Rev., and the Superior Courts have the same authority to remove criminal causes to adjacent counties as they had before the compilation of that Revisal.

4. The sentence of the Court must be carried into execution by the Sheriff of the county in which the prisoner is tried.

(*State v. Adair*, 66 N. C., 298; *State v. Christmas*, 51 N. C., 376; *State v. Twigg*, 60 N. C., 142; *State v. Woodside*, 31 N. C., 496, cited and approved).

INDICTMENT FOR MURDER, tried before *Watts, J.*, at Fall Term, 1874, MADISON.

The defendant was charged with the murder of one Daniel Sternbergh, in the county of Buncombe, and the case was removed to Madison County upon the affidavit of the defendant.

Upon the trial one G. W. Rhodes, one of the *venire*, came upon the stand, was passed by the State, and tendered, whereupon he remarked he did not wish to be a juror in the case, as he was a cousin to the prisoner. The counsel for the State stated that he was not aware of the juror's relationship at the time he passed him. The juror was ordered to stand aside, whereupon the prisoner excepted.

The facts as disclosed by the evidence are as follows: The deceased, a citizen of Kansas, some two weeks before his death, arrived at Old Fort, in the county of McDowell, and was engaged in examining the mineral regions in the neighborhood. As he was about leaving Old Fort on a stage
(470) in company with one Gaston, with the intention of going to Macon and other western counties, the prisoner drove up with a wagon. The deceased asked him how near he

would go to Asheville on his return. The prisoner replied that he would pass within two miles of Asheville. The prisoner was driving a wagon for one Dr. Fletcher. The deceased and prisoner made a contract by which the prisoner agreed to carry the baggage of the deceased to Swannanoa bridge, two miles from Asheville, for fifty cents. Thereupon the deceased placed his baggage, a valise and overcoat, in the wagon and started up the mountain, a short distance ahead of the prisoner. He was next seen at the toll-gate near the top of the mountain, still ahead of the wagon. The prisoner arrived at the toll-gate with the wagon a short while after the deceased left. The deceased next stopped at Kerley's, two miles below the gate, remained some time, and inquired for a good place to stay all night. Was recommended to stop at Mr. Alexander's four miles below that point. The prisoner drove up about that time and said he could drive that far that evening. It was then about 3 or 4 o'clock on 6 June. The deceased and prisoner then left, deceased walking by the wagon. Before they passed out of sight the deceased was seen to get into the wagon. About dark the wagon was seen and recognized at camp on the North Fork of the Swannanoa, and two men sitting by the fire. About 9 or 10 o'clock Mrs. Stepp, residing some four hundred yards from the camp, heard a pistol or gunshot, and cries as if in pain following immediately. The wagon was heard to drive away from the camp just before daylight next morning, was seen and recognized at Alexander's, a mile below, driving rapidly down the river. At 11 o'clock the prisoner stopped, four miles from Asheville, on the Henderson road, and about fifteen miles from the camp, and asked for dinner, saying that he had eat no breakfast that morning, as he was sick. This was on Sunday. On the following Friday Major Porter discovered the body of the deceased, in a mutilated condition. This was two hundred yards below the camping-place, in the river. The body was badly mutilated. In the face below the eye (471) was a hole, apparently made by a bullet. An inquest was held and upon examination of the camp-ground a pencil and pair of spectacles were found and identified as the property of the deceased. A large firebrand was also found upon which was hair and blood. Near the edge of the water were found blood and brains covered with leaves, and the leaves

covered with stones. The body was identified as that of Daniel Sternbergh. The coroner issued a warrant for the arrest of the prisoner. At the time of his arrest a pin-cushion, a pocket-knife, two pocket-books, a watch and chain, a dirk knife and a pair of gloves were found in the possession of the prisoner, and identified as the property of the deceased. While under arrest and on his way to Asheville, the prisoner, without any promise, threat or inducement, expressed or implied, stated to one of the guard, the others not being present, that he had killed the deceased; that they were both drunk and playing cards and got into a dispute, in the course of which deceased gave the prisoner the lie, whereupon the prisoner seized an axe and deceased a stick; prisoner got the first lick, struck deceased on the head and face and killed him. While in jail prisoner sent for one J. J. Ledford, a deputy sheriff who had charge of him, and voluntarily told him where the valise and overcoat might be found. In pursuance of this information the Sheriff went to the place designated and found them. The prisoner subsequently told Ledford that he, the prisoner, killed the deceased for his money; that he had prepared the plan before he reached the camp; that he had feigned himself sick and purposely delayed the wagon so that the deceased could not get to Alexander's, and had arranged the camp-fire and camp-chest with a view to the murder. That while at supper he pretended to be sick, got up, went to the fire and cut off a stick of wood, and while the deceased was looking in another direction, he struck him in the head with the axe. He then dragged him to the water, when,

(472) the deceased making some struggles and noises, he struck several more blows, robbed him and threw him into the river.

The prisoner objected to the admission of these declarations. The objections were overruled, and the prisoner excepted.

The prisoner relied on the plea of insanity, and introduced evidence to show that two aunts on his mother's side were demented, and two aunts on his father's side were weakminded and "crochety"; that a great-uncle had committed suicide, under a temporary fit of insanity, and that a distant relation had recently been committed to an insane asylum.

There was no evidence that the prisoner had exhibited any signs whatever of insanity.

The prisoner asked his Honor, among other things, to charge the jury: "Though the evidence may leave the question of insanity in doubt, if upon the whole evidence in the case the jury entertained a reasonable doubt as to the perfect sanity of the prisoner at the time of the commission of the alleged act (if committed at all), then they were bound to acquit him."

The prisoner further asked the Court to charge the jury that "the jury have the right, from their own knowledge of human nature and the tendencies of the human mind, in addition to and in confirmation of the evidence of experts and others, touching the question of insanity, to say how far the circumstances, at and after the time of the alleged act, which were relied upon to show insanity when the alleged act was committed, are evidence of such insanity at that time, and if such evidence and circumstances leave their minds in doubt as to his insanity, then they are bound to acquit him."

The prisoner further asked the Court to charge the jury "that to constitute a crime, the accused must be acted on by a motive and governed by a will."

His Honor was also asked to charge "that the diseased condition of mind of the prisoner's blood relations, from his paternal grandmother and her blood relations, down to his generation in all its branches, as well as the conduct of the prisoner before, at the time of, and after the alleged commission of the act, are evidence for the jury to consider in making up their verdict in this case, and if from all (473) these things they believe that the prisoner was insane, either morally or intellectually, at the time of said act, or have a reasonable doubt as to whether he was sane or insane, or laboring under a diseased state of mind so as to be deprived of reason for the time, then it will be their duty to acquit him."

The prisoner further asked his Honor to charge: "That to make the prisoner responsible for the act charged upon him, he must have been intellectually and morally sane in reference to that act, as well as to the deceased, at the time of its commission." All of which special charges his Honor refused to make.

The prisoner excepted to the ruling of the Court in refusing to make the special charges requested.

The jury returned a verdict of guilty. Judgment was rendered, and the prisoner appealed.

Shipp & Bailey, for the prisoner.

Attorney-General Hargrove, with whom was *Collins* and *Davidson,* for the State.

BYNUM, J. The prisoner was charged with the murder of one Daniel Sternbergh.

In making up the jury on the trial, one of the *venire* was called, and not being challenged by the State, was tendered to the prisoner; but before he was accepted, he objected to himself as being of kin to the prisoner. The Court thereupon stood him aside, and the prisoner excepted. The jury was then completed without exhausting the prisoner's right of peremptory challenge. In the *State v. Adair,* 66 N. C., 298, after twelve persons were tendered and accepted by the prisoner, and sworn, but before they were impaneled, the Court was informed that one of the jurors was related, by affinity, to two of the prisoners, which, upon inquiry, appeared to be so; but the fact was not known when the juror was sworn. The juror was discharged, and after exception thereto, an-
(474) other was tendered and taken. On appeal, it was held by this Court that as the jury was not impaneled and charged with the case, it was within the discretion of the Court to allow the State the benefit of a challenge for cause, so as to secure a jury indifferent as between the State and the prisoner. Certainly it can be no less within his discretion, when the proposed juror is not only not impaneled and charged with the case, but not so much as accepted and sworn. As the prisoner obtained a jury of his own selection, in no point of view was he prejudiced by the action of the Court.

The prisoner, in his defense, relied upon the plea of insanity, and to establish it gave in evidence that some of his uncles and aunts were insane; but the case states that *"there was no testimony whatever that the prisoner had exhibited signs of insanity,"* and the testimony, which is made a part of the case, fully bears out the statement just quoted. When a foundation is laid by *some* evidence tending to show insanity in

the prisoner, it is held admissible in corroboration, and as an additional link in the chain of circumstances, to give in evidence a hereditary taint in the blood, of a like malady. But it has never been held in this State, or elsewhere, so far as our researches extend, that such evidence is admissible by itself, and without some testimony that the prisoner himself was affected by some form of mental alienation. To allow such evidence to go to the jury as independent proof of the insanity of the prisoner would be of the most dangerous consequence to the due administration of criminal justice, since there are but few persons, it is ascertained, who have not had ancestors or blood relations, near or remote, affected by some degree of mental aberration. To admit such testimony, then, under the conditions set forth in this case, would break down the strongest barriers to crime established by the laws of evidence as heretofore understood. *State v. Christmas,* 51 N. C., 376.

The special instructions for the jury, as to the insanity of the prisoner, should have been denied in every form in which they were presented, and the Judge should have told the jury that there was *no* evidence of the prisoner's (475) insanity. Instead of doing this, his Honor gave the prisoner the full benefit of the instructions asked for by his counsel; not, indeed, in the precise form asked for, but in substance and effect. For one of the instructions asked for by the prisoner's counsel was that "if the jury believe that at the very time of the commission of the act alleged against him the prisoner was, from causes either of congenital mental taint or otherwise then operating on his mind, or suddenly occurring to him, unconscious of the nature of the act in which he was engaged, he ought to be acquitted." This charge his Honor gave and repeated it in four other forms out of eleven in which the ingenuity of counsel contrived to present the same thing in substance and legal effect. If, therefore, there had been any evidence of insanity to go to the jury, the prisoner would not have been entitled to a more favorable charge.

But as the charge was upon purely a hypothetical state of facts, it was an error in favor of the prisoner, of which he cannot complain. We are therefore relieved from any examination of the special instructions allowed or refused, or of the

conditions and limitations under which evidence of hereditary insanity becomes admissible.

The objection has been here made that the Court which tried the prisoner had no jurisdiction of the case. The indictment was found in the county of Buncombe, and upon the application and affidavit of the prisoner, that he could not have an impartial trial in that county, the Court ordered the case to be removed to the county of Madison for trial, and he was there tried. This order of removal was made under the provisions of Rev. Code, ch. 31, sec. 115. It is insisted by the counsel of the prisoner that this provision for the removal of causes, having been omitted in Battle's Revisal, and ch. 121, sec. 2, of this Revisal having repealed "all acts and parts of acts theretofore passed, the subjects of which are digested and compiled in the Revisal, or which are repugnant to the provisions thereof," that by force of this section
(476) the provision of the Revised Code, for the removal of criminal actions, was repealed. If such is the proper construction of the effect of ch. 121 of the Revisal, the Court which tried the prisoner had no jurisdiction, even if such a construction should operate in many cases as a denial of justice.

It thus becomes necessary to inquire and ascertain what effect is to be given to Battle's Revisal as a digest and compilation of our laws. And to arrive at a just conclusion upon this question, we must put together and construe as one act the act which authorized the compilation and the act which subsequently put the Revisal into operation.

Ch. 210 of the Acts of 1871-'72 is entitled, "An act to provide a compilation of the public statutes," the first section of which provides, "that William H. Battle be and he is hereby appointed a commissioner to collate, digest and compile all the public statute laws of the State, now in force or in use, etc., distributing them under such titles, divisions and sections as he may think convenient and proper to render the said acts more plain and easy to be understood." It is thus seen that the legislative purpose was that the commissioner should collect together the scattered public statutes into one book for easy reference and so arranged as to be "more plain and easy to be understood." He had no authority to omit any, but on the contrary he was charged to "compile *all* the

statute laws now in force." To carry out the original design, and in execution thereof, ch. 74 of the Acts of 1872-'73 was passed after the work was compiled, the second section of which enacts "that all acts and parts of acts, etc., the subjects whereof are digested in this Revisal, or which are repugnant to the provisions thereof, are hereby declared to be repealed," etc. Construing these two acts together, two conclusions are apparent: 1st, that *all* the public statutes were intended and directed to be compiled; and 2d, that only "those acts and parts of acts, the subjects whereof are digested and compiled in the Revisal or which are repugnant to the provisions thereof," are expressly repealed. A satisfactory reason for this cautious, additional repealing clause may (477) be found in the fact that the Revisal never passed through the process of legislative scrutiny and enactment. It might well be supposed that great mischief would result if important public laws should be left out of the Revisal and be swept from the statute-book by a broad repealing act. If such had been the legislative intent, nothing could be more obvious than the mode of carrying that purpose into execution. The repealing act would have been in this wise: "All the public statutes of the State not contained in Battle's Revisal are hereby repealed." That a very different and limited act of repeal was adopted is certain evidence that a very different and limited repeal was intended.

The law does not favor implied repeals of statutes, and a repealing act, therefore, will not be extended by implication beyond the plain and obvious intent of its enactment. *State v. Woodside,* 31 N. C., 496. A statute which may be construed without violence to its provisions, so as to accomplish the public object within its provisions and at the same time prevent a public mischief which would result from a contrary construction, upon every principle of justice and equality must receive that construction.

The conclusion would seem to follow that all acts and parts of acts then in force, and which are omitted in the Revisal, are unrepealed and in full force and effect, as much so as if the Revisal had never been. What effect, then, is to be given to this compilation by the courts? The answer is, that just that effect is to be given to it as was intended and declared to be, by the Legislature, in sec. 12, ch. 121. "The copies of the

said Revisal which shall be printed as aforesaid shall be received as evidence of the law, before all the tribunals, and in all places, in the same manner to all intents and purposes as the originals in the office of the Secretary of State." Higher sanctity could not be given to it than the original acts therein digested and compiled. Whether, according to the spirit of our Constitution and form of government, it would be competent for the Legislature to declare *a book* to be the
(478) law of the State, or, which is the same, conclusive evidence of the law, without that book having passed through the constitutional forms of legislation, as the Roman emperors did by edict, is a question which does not now arise, as all the statutes contained in the Revisal had been enacted and were in force prior thereto, and it was neither the intent nor effect of the Revisal to give the statute-law of the State other or greater validity than it then had.

Applying these conclusions to our case, it appears that the whole of ch. 31, Rev. Code, sec. 115 of which provides for the removal of criminal actions to another county for trial, is omitted in the Revisal, and although this section was then law, through some inadvertence the compiler failed to digest and bring it forward in the Revisal. We hold that that section of the Rev. Code is not repealed, and that under it the Court had the power to remove the cause to an adjacent county for trial.

But in passing judgment upon the prisoner and as a part thereof, his Honor ordered that the prisoner be executed in the county of Buncombe, where the bill had been found. This was error.

The sentence of the Court must be carried into execution by the Sheriff of the county where the trial took place. *State v. Twiggs,* 60 N. C., 142. As, however, upon the return of the certificate of the opinion of this Court to the Court below, the prisoner is to be resentenced, this error of his Honor can be then corrected. *State v. Cook,* 61 N. C., 535.

PER CURIAM. No error.

Cited: Sikes v. Comrs., ante, 36; *Hodge v. Hodge, post,* 618; *Mauney v. Pemberton,* 75 N. C., 220; *S. v. Taylor,* 76 N. C., 66; *S. v. Baldwin,* 80 N. C., 393; *Askew v. Bynum,* 81 N. C., 353; *S. v. Green,* 95 N. C., 614; *Bank v. Bobbitt,* 111 N. C., 196; *Dunn v. R. R.,* 131 N. C., 447.

(479)

M. M. DAVIS v. JAMES CALLOWAY.

Where a sheriff, having in his hands an execution against A, and another against B, sold property found by the jury to belong to A (who was present and forbade the sale), under the execution against B, saying nothing at the sale of the execution against A: *Held*, that the Sheriff was responsible to A for the value of the property so sold.

ACTION, tried before *Cloud, J.*, at August (Special) Term, 1874, WILKES, to recover the value of a yoke of oxen and a wagon. The defendant offered in evidence a judgment and execution against one Fletcher for forty-odd dollars. The execution was dated January .., 1869. That the Sheriff levied this execution on the oxen and wagon and also on a cow, as the property of said Fletcher, on 1 February, 1869, took the same into his possession and advertised them for sale on 2 March, 1869, as the property of said Fletcher.

The defendant then introduced another judgment and execution in favor of himself, for $2.10, against the plaintiff, M. M. Davis, dated respectively 28 February and 1 March; the execution was levied on said property.

The defendant also offered to show that the property in question had not been listed for taxes for the previous year, and that he, upon the information of one Mills, another deputy sheriff, had made a memorandum of said property for taxes, and had assessed the same at ninety cents, and that he also had the memorandum in his possession on the day of sale.

That on 2 March, 1869, he sold said property, selling the cow, the yoke of oxen and wagon separately; there was no evidence to show which was sold first. The defendant Calloway became the purchaser, at about the price of forty dollars, the cow bringing about eleven dollars.

The plaintiff was present and forbade the sale of the property, claiming it as her own. Neither the officer who made the sale nor the defendant informed the plaintiff that the officer had an execution against her, nor that he (480) had any unsettled taxes against her, nor that he was selling the property as hers, nor that any part of the proceeds arising from the sale would be applied to the payment of her debts or taxes.

The defendant then introduced evidence tending to show that the property belonged to Fletcher, and the plaintiff intro-

duced evidence tending to show that the property belonged to her.

His Honor instructed the jury that as to the taxes, they had not been properly assessed, and that the defendant could not justify the sale and conversion of the property on that account, and that they should put the taxes out of view in making up their verdict.

That if the officer was justified at all in selling the property under the judgment in favor of Calloway against Davis, for $2.10, the cow, which brought $11, overpaid that, and that the defendant could not justify the conversion of the oxen and wagon under that execution, and that they should put that out of their way in making up their verdict.

His Honor further charged the jury that the question for them to determine was whether the property sold, to-wit, the cow, oxen and wagon, was the property of the plaintiff Davis, or not; if it was, she was entitled to recover the value of the oxen and wagon. But if it was not her property, and was the property of Fletcher, as alleged by the defendant, they should find a verdict for the defendant.

The jury returned a verdict for the plaintiff, and the defendant moved for a new trial. The motion was overruled, whereupon the defendant appealed.

Folk & Armfield, for appellant.
Furches, contra.

RODMAN, J. We must take it as established by the verdict that the wagon and oxen sued for were the property of the plaintiff, and not of Fletcher. His Honor told the
(481) jury that the sale of the cow paid off the execution for $2.10 against the plaintiff, and therefore a sale of the plaintiff's estate in the wagon and oxen was unauthorized and void. This would have been right if there had been evidence to show, as his Honor assumed, that the cow was first sold. But the case states that there was no evidence as to which article was first sold. Of course, therefore, his Honor erred in this respect. But was it an error which prejudiced the defendant? We think not, for all the evidence shows that the Sheriff did not profess to sell the estate of the plaintiff, and professed to sell only that of Fletcher.

There is no authority for saying that the fact that he had in his hands at the time an execution against the plaintiff, which he did not make known or profess to act under, made the sale operative to pass the title of the plaintiff. Any such doctrine would be unreasonable. In case of a disputed title (as here) a purchaser would never know whose estate he was buying. A sale by a sheriff might be made a cover for the grossest frauds, of which, if we may form an opinion from the facts stated, the present case would be a good illustration.

PER CURIAM. Judgment affirmed.

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(482)

STATE v. JAMES, alias BURTON GRAVES.

1. It is error, on a trial for burglary, for his Honor to charge the jury that if they believed "from the evidence that the prisoner was in possession of the watch and chain in Danville on the Monday after the same had been stolen on the previous Saturday night in Greensboro, the law presumed that he was the thief, and that the prisoner was bound to explain satisfactorily how he came by the stolen goods."

2. The rule is, where goods are stolen and found in possession so soon thereafter that he could not reasonably have got the possession unless he had stolen them himself, the law presumes he was the thief.

(*Pearce v. Lea*, 68 N. C., 90, cited and approved).

INDICTMENT FOR BURGLARY, tried before *Kerr, J.*, at December Term, 1874, GUILFORD.

The burglary alleged was the breaking into and entering the house of J. I. Scales, in the city of Greensboro, N. C., on the night of 8 August, with the intent to steal, and stealing and carrying away a watch and chain, the property of J. I. Scales.

There was evidence tending to prove that between 9 o'clock on that night and 2 o'clock A. M. of 9 August, Mr. Scales' house was entered by some one forcing open the blinds and raising the window-sash of a room called the nursery; that between that room and the bedchamber was the dining-room; that a lamp was left burning in the dining-room, from which a light shown into both the nursery and bedchamber. That

Scales went to bed about 9 o'clock and hung his coat and vest on the back of a chair in his bedroom, the watch being in the vest pocket and attached thereto by the chain.

That Jennie Stevens, a colored servant girl, was in the house when Scales went to bed; at what time she left the house was not shown, further than that she left during the night and went to her usual place of sleeping.

It was further in evidence that the prisoner was in Danville, in the State of Virginia, on 10 August, and had the watch and chain in his possession, and swapped them
(483) off for another watch and chain, getting boot.

It was in evidence that the prisoner was in Rockingham County on 6 August, at the election, and also on the night of the 6th, and that he said on that night he was going to Greensboro the next day, and did leave the house at which he was stopping the next day.

There was no evidence that he was in Greensboro on the night in which the alleged burglary was committed.

The prisoner was arrested about 4 September in Rockingham and brought to Greensboro jail. When arrested, the prisoner denied the charge.

When in prison the prisoner told Scales that he got the watch and chain from John and Dennis Sellars on Sunday night, the 9th of August, and that they got him to take them to Danville and trade them off. The prisoner at first told Scales that he did not know the watch, but in a few minutes afterwards admitted that he did know the watch as soon as he saw it; that he had seen Scales wear it a hundred times.

It was proven that the prisoner, preceding and up to July, had been a servant of Scales and often in his house and the rooms thereof. That on the first or second day after the watch was stolen, Scales had Jennie Stevens, his servant, and one Jim Edwell arrested on the charge of committing the crime. That on the night of the alleged burglary Jim Edwell was seen about dark dodging behind a tree at the corner of the house, near the window alleged to have been broken open. That he was halted by a servant-man twice before he did so, near the front gate of the residence of Scales. That some hour or two afterwards this servant and Jennie Stevens went out of the front gate and saw Edwell alone, again passing; that he walked before them a half mile, and Jennie

Stevens had a conversation with him which the witness did not hear. That Jennie Stevens had a small bundle which she gave to witness to hold while she talked with Edwell. That about an hour afterwards witness saw Edwell in about one hundred yards of Scales' house talking to a col- (484) ored man.

It was also in evidence that when the prisoner had the watch in his possession and was offering to exchange it for another, he said that he had bought it of a broker for $40, and in a few minutes he told another person the gave $48 for it, and said that he made a mistake when he said he gave $40. It was also shown that when the prisoner was arrested he was concealed under a bed, and had tried to escape up a chimney.

His Honor, among other things, charged the jury that if they believed from the evidence that the prisoner was in the possession of the watch and chain in Danville, Virginia, on the Monday after the watch was stolen on Saturday night, the law presumed that he was the thief, and that he was bound to explain satisfactorily to them how he came by it.

The prisoner excepted. The prisoner's counsel asked his Honor to charge "that if there was any reasonable hypothesis arising out of or suggested by the evidence by which, taking all the facts proven to be true and he not guilty, that the jury should acquit the prisoner." His Honor charged the jury that "in giving to the prisoner the benefit of the reasonable doubt they should not be controlled by mere conjecture that some one else did the deed; that they must be fully satisfied that the prisoner did the deed." Prisoner excepted.

There was a verdict of guilty; rule discharged; judgment of death pronounced, and the prisoner appealed.

Scott & Caldwell, for the defendant.
Attorney-General Hargrove, for the State.

PEARSON, C. J. The fact that the "watch and chain" were found in the possession of the prisoner, at Danville, on the Monday after the burglary on the Saturday night preceding, at Greensboro, connected with the fact that he was offering to dispose of the articles at much less than their value, and made contradictory statements as to how he got them, were

matters tending to show either that the prisoner was
(485) the man who broke and entered the dwelling-house and stole the watch and chain, or else that he had received the goods knowing them to have been stolen. These facts, taken in connection with the evidence of the mysterious movements of Jim Edwell and Jennie Stevens about the premises on the night of the burglary, were fit subjects for the consideration of the jury.

His Honor committed manifest error in taking the case from the jury and ruling that "if the jury believed from the evidence that the prisoner was in possession of the watch and chain in Danville on the Monday after the watch and chain were stolen on Saturday night in Greensboro, *the law presumed he was the thief,* and had stolen the watch and chain, and that the prisoner was bound to explain satisfactorily how he came by the goods." The rule is this: "When goods are stolen, one found in possession so soon thereafter that he could *not have reasonably got the possession unless* he had stolen them himself, *the law presumes* he was the thief." This is simply a deduction of common sense, and when the fact is so plain that there can be no mistake about it, our courts, following the practice in England, where the Judge is allowed to express his opinion as to the weight of the evidence, have adopted it as a rule of law, which the Judge is at liberty to act on, notwithstanding the statute which forbids a Judge from intimating an opinion as to the weight of the evidence. But this rule, like that of *falsum in uno, falsum in omnibus,* and the presumption of fraud, as a *matter of law,* from certain fiduciary relations (see *Pearce v. Lea,* 68 N. C., 90), has been reduced to very narrow proportions, and is never applicable when it is necessary to resort to other evidence to support the conclusion; in other words, the fact of guilt must be *self-evident* from the *bare fact* of being found in the possession of the stolen goods, in order to justify the Judge in laying it down as a presumption made by the law; otherwise it is a case depending on circumstantial evidence, to be passed on by the jury.

(486) In our case, so far from the fact of guilt, to-wit, that the prisoner broke and entered the house and stole the watch and chain, being self-evident, it is a matter which under the circumstances proved admits of grave doubt, for

it may well be that the prisoner merely received the watch and chain, after some one else had committed the burglary, which would change the grade of crime very materially. As the case goes back for another trial, it is a matter for the Solicitor of the State to consider whether it will not be well to send a new bill containing other counts to meet the different aspects of the case as it may be looked upon by the jury. Error.

PER CURIAM. *Venire de novo.*

Cited: S. v. McRae, 120 N. C., 609; *S. v. Hullen,* 133 N. C., 660.

THE CHESTER AND LENOIR NARROW-GAUGE RAILROAD COMPANY and others v. THE COMMISSIONERS OF CALDWELL COUNTY.

1. Sec. 7, Art. VII, of the Constitution of the State, prohibits any county, city, town or other municipal corporation, from contracting any debt, etc., without the affirmative consent of a majority of the people of the county who are qualified to vote.

2. And the Act of 1869-'70, ch. 9, being an attempt to evade the restriction which the Constitution has put on counties, etc., to contract debts, is unconstitutional and void.

(*Reiger v. Commissioners,* 79 N. C., 319, cited and approved; *Cloud v. Wilson, ante,* 155, distinguished).

MANDAMUS, tried before *Mitchell, J.,* at chambers, at January Term, 1875, CALDWELL.

The plaintiff, the Chester and Lenoir Narrow-gauge Railroad Company, brought an action against the defendants for a *mandamus* to compel them to subscribe for certain stock in the company of plaintiff. The material facts in the case are as follows: The Carolina Narrow-gauge Rail- (487) road was incorporated 8 February, 1872, by an act of the General Assembly, and immediately thereafter duly organized as a corporation.

By an act of the General Assembly of South Carolina, ratified 26 February, 1873, the Chester and Lenoir Narrow-gauge Railroad Company was duly incorporated, and by a

provision of that act authorized to consolidate with the Carolina Narrow-gauge Railroad Company. By an act of the General Assembly of North Carolina, ratified 22 January, 1873, the Carolina Narrow-gauge Railroad Company was authorized to consolidate with the Chester and Lenoir Narrow-gauge Railroad Company.

By authority of these acts of the General Assemblies of North Carolina and South Carolina, the Chester and Lenoir Narrow-gauge Railroad Company and the Carolina Narrow-gauge Railroad Company were consolidated 14 May, 1873, under the name of the Chester and Lenoir Narrow-gauge Railroad Company.

On 23 August, 1873, the defendants, the County Commissioners of Caldwell County, met, and in pursuance of the act of the General Assembly, ch. 191, Laws 1868-'69, and a majority of all the members of the board being present, caused to be spread upon their record the following resolution, to-wit:

"*Resolved, I.* That in order to secure to the people of said county the benefit to be derived from the building and operation of a railroad within the county, the County Commissioners aforesaid in their official capacity do hereby subscribe, subject to the ratification of the qualified voters of said county at an election hereinafter provided for, for six hundred shares of the capital stock of the Chester and Lenoir Narrow-gauge Railroad Company, upon the terms and conditions following:

"1. That this subscription shall be payable in the bonds of said county, at their par value.

(488) "2. That the said bonds shall be payable twenty years from the date of their issue, with coupons for the interest attached, and shall be of the denomination of one hundred dollars each, bearing interest at the rate of seven per centum per annum, payable annually, on 1 January.

"*Resolved, II.* That in exchange for certificates of stock in the Chester and Lenoir Narrow-gauge Railroad for like amounts, the County Commissioners aforesaid shall deliver to the president and directors of said railroad company the bonds of said county, at the time and in the manner following, viz.: Upon the completion of said railroad company's railroad bridge over the Catawba River, one hundred bonds,

amounting to $10,000. Upon the completion of said railroad to the town of Marion, five hundred bonds, amounting to $50,000.

"*Resolved, III.* That it shall be the duty of the County Commissioners aforesaid to appoint proxies to represent and vote the stock of said county at all meetings of the railroad company, to receive the dividends which may be declared from time to time by said railroad company, to apply said dividends to the payment of the interest on the county bonds, and to perform such other duties as may be necessary to protect the interest of the county as a stockholder in said company.

"*Resolved, IV.* That the coupons of said county bonds as they become due shall be received in payment of all county taxes.

"*Resolved, V.* That a tax sufficient to meet the interest accruing on said county bonds shall be imposed and collected annually as other taxes are.

"*Resolved, VI.* That in order to obtain an expression of the will of the people of our said county and to make valid the aforesaid subscription in case of its approval by the qualified voters of said county at the polls, an election shall be held according to law at the several precincts in said county on 9 October, 1873, at which election all those who are in favor of the county subscription aforesaid shall vote upon written or printed ballots, 'Subscription,' and those opposed to (489) the said subscription shall vote 'Against Subscription.'"

In pursuance of the above resolution an election was held 9 October, 1873, after being advertised according to law, at which election 387 votes were polled in favor of said subscription and 344 against subscription.

It was in evidence that at the Presidential election of 1868 the largest number of votes cast was 1,011; at the election for Attorney-General in 1870 the greatest number was 949; at the election concerning a convention in 1871 the largest number of votes cast was 1,055; at the election for Governor in 1872 the greatest number of votes cast was 1,161.

After hearing the case his Honor gave judgment for the plaintiff. From which judgment the defendants appealed to

the Supreme Court. These are the material facts in the case except those set forth in the opinion of the Court.

Smith & Strong and *Gaither & Bynum,* for appellants.
Folk & Armfield and *Cilley, contra.*

RODMAN, J. Our opinion as to the meaning of sec. 7 of Art. VII of the State Constitution relieves us from the necessity of considering any of the other questions which were ably and learnedly discussed by counsel.

That section is in these words:

"SEC. 7. No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, *unless by a vote of a majority of the qualified voters therein.*"

It is contended for the plaintiffs that these words mean a majority of the qualified voters therein, who *actually vote at the election upon the question.*

1. It is not the natural meaning of the words used, but requires an addition of words to qualify and limit the generality of the expression. If the words used are so ambiguous as to be unintelligible without some addition (as were (490) the words prescribing the tenure of a Judge appointed to fill a vacancy, commented on by the Chief Justice in the case of *Cloud v. Wilson, ante,* 155), such addition must be made as may be found proper on a consideration of the context and of all other circumstances bearing on it. But to add limiting or qualifying words is not in general permissible, or except for very strong reasons, when the words used contained an intelligible description of the object. The word *"therein"* is important. It means *"in the county,"* and the phrase may then be read as, "a majority of the qualified voters of the county."

2. To this construction it is objected that the number of qualified voters cannot be certainly ascertained except by a census, or registration, immediately preceding an election. The Constitution, Art. VI, sec. 2, directs the General Assembly to provide for a registration of voters from time to time; and it has accordingly provided for a registration just before each general election. It must have been such a registration

that was in the view of the framers of the section under discussion as the means of determining the number of qualified voters in a county. It would not be precisely accurate for any period after the election in view of which it was taken, but it would be sufficiently so, for practical purposes.

3. The question to be determined in this case differs in several material respects from that in *Reiger v. Commissioners,* 70 N. C., 319. The act which gave the defendants in that case power to contract the debt on the result of an election evidently assumed that but for each act they had not the power. It was intended to be an enabling act. The clause in the Constitution which we are now considering assumes that municipalities might contract, if not prohibit. It is a disabling act, and must be reasonably (I do not say liberally) construed to suppress the grievance. What was the grievance? Many counties and towns, as is well known, had contracted debts, the interest of which, under the changed circumstances, could only be met by oppressive taxation, and in consequence of that the value of immovable property in such places was reduced. Under the construction (491) contended for by the plaintiffs the section in question would be an inadequate remedy. In all or most instances of county debts by subscriptions to railroad stocks they had been submitted to the people of the county and approved by a majority of those voting. Experience demonstrated that an active few, interested in procuring the subscription, could nearly always succeed in getting a majority of the actual voters. The Constitution meant to put new restrictions on municipalities to increase the difficulty of their contracting debt and to give the tax-payers additional protection, not only against the extravagance or fraud of their municipal representatives, but also against the arts of corporations and the imprudent generosity of a minority of the voters. It meant to prohibit the contracting of a debt without the affirmative consent of a majority of the people of the county who were qualified to vote.

The case of *Reiger* differs from the present in a particular even more material. In that case the Commissioners declared that the requisites of the law had been complied with, and issued the town bonds, which went into the hands of innocent purchasers. In the present case the Commissioners have de-

clared that the proposed subscription received a majority of the votes cast at the election, but they have not declared that the requisites of the Constitution have been complied with, and they have not issued the bonds. No innocent holder is in the case.

The decision in *Reiger's case* is supported by the case of *Webb v. Commissioners,* Law Reports, 52, B., 642, and by numerous cases cited in Bigelow on Estoppel, 461 to 468. These cases illustrate the just distinction between cases in which a corporation is required to issue bonds *ultra vires,* and where it has issued the bonds which have come into the hands of an innocent purchaser. In the latter class of cases the corporation is estopped to deny the regularity of the issue. *Rogers v. Burlington,* 3 Wall., 654.

4. The Act of 1868-'69, ch. 3, enacts that in all
(492) special elections persons theretofore registered as voters should be allowed to vote, and the judges holding an election are required to register all qualified persons on application. The Act of 1869-'70, ch. 9, amends the above by adding to it a *proviso* that in all special elections ordered by any county the judges shall register the names of all persons who vote, and "a majority of all the votes cast, so registered, shall prevail for the purposes of such election."

The counsel for the plaintiffs construe this act as requiring a new registration of every voter before the special election, and as disqualifying any person from voting at that election who is not so specially registered. Whether this was the intention seems doubtful, but we will assume that it was. We think that the act is unconstitutional. The Assembly has power, and is required, to provide from time to time for the registration of voters, and no person can vote who has not been registered. No doubt the Assembly might require every qualified voter, even if he had been previously registered, to register over again in view of every election. Perhaps, also, it might lawfully require all voters to register over again in view to every election, and might declare that only those so registered should vote at that election. The vice of the act does not consist in this, but in declaring that a majority of the votes cast shall prevail, thereby ignoring all those qualified voters who did not register in view of the special election, but

who, nevertheless, are in the meaning of the Constitution a part of the qualified voters of the county, a majority of whom must vote in favor of a debt before it can be contracted. The Constitution defines who are the qualified voters of a county (Art. VI, sec. 1), and the Legislature cannot change the qualifications.

Although no person can vote without registration, yet if he comes within the description contained in the section just cited, he is a qualified voter of the county within the meaning of sec. 7, Art. VII, although he has never registered. Within the meaning of that section a qualified voter is one who is entitled to be registered as a voter and who is (493) qualified to vote upon registration.

It is true that the only practicable way of ascertaining the number of qualified voters of a county at any given time is by a reference to the book of registration of the general election next preceding, so that, practically, the number of qualified voters and of voters so registered is the same. But in the idea of the Constitution, the terms "qualified voters" and "registered voters," are not exactly co-extensive. The former is the most extensive. Sec. 1 of Art. VI defines who are qualified voters. Sec. 2 disables from voting such qualified voters as fail to register. Non-registration is therefore not a disqualification, but a disability, just as a man may be a qualified voter in every respect, though disabled from voting by reason of sickness which prevents his getting to the polls.

The act is plainly an attempt to evade the restriction which the Constitution has put on the power of counties to contract debts. It would permit a county debt to be contracted without the consent of a majority of the qualified voters therein.

In our opinion the Judge below erred in ordering the *mandamus*.

PER CURIAM. Judgment below reversed, and judgment in this Court for the defendants.

Cited: Belo v. Comrs., 76 N. C., 494; *Norment v. Charlotte*, 85 N. C., 390; *Evans v. Comrs.*, 89 N. C., 158; *Southerland v. Goldsboro*, 96 N. C., 51; *Duke v. Brown, Id.*, 129; *Markham v. Manning, Id.*, 134; *Quinn v. Lattimore*, 120 N. C., 430; *Clark v. Statesville*, 139 N. C., 498; *Pace v. Raleigh*, 140 N. C., 73.

ZACHARIAH SHEARIN and others v. HENRY B. HUNTER, administrator de bonis non.

It is the plain duty of a Probate Judge to refuse to confirm a sale of land by an administrator under a decree of his Court, when it appears that the land was bid off at such sale for the benefit of the administrator.

(*Hyman v. Jernigan*, 65 N. C., 96, cited and approved).

MOTION to set aside a decree of sale, made by the (494) Probate Court, upon the petition of Zachariah E. Shearin, administrator of John P. Shearin.

The facts in the case are as follows: On 29 March, 1872, Zachariah E. Shearin filed a petition in the Probate Court of Warren County for the sale of a tract of land, of which his intestate died seized, for the payment of his debts. On 14 November a decree was made for the sale of the tract of land, which decree was afterwards twice renewed with slight modifications. Afterwards, to-wit, on 22 March, 1874, no sale having taken place, and Zachariah E. Shearin having been removed and the defendant Henry B. Hunter appointed administrator *de bonis non,* a decree was made for the sale of the land by the defendant, at auction, on a credit of twelve months, $150 to be paid in cash, and the balance to be secured by bond with approved security.

The sale was duly advertised according to law, and the land was sold on 6 April, 1874. H. A. Foote became the purchaser for $1,410.

At the time of the sale the defendant requested H. A. Foote to see that the land did not sell for less than $1,500, telling him that if the land was knocked down to him he would take the bid off his hands. It was understood after the sale, and admitted by the defendant, that defendant was the real purchaser, but a title was made to Foote, as defendant alleged, to prevent complication, and Foote was to convey the land to the defendant.

The plaintiffs in the present action, the heirs of the intestate of the defendant, filed a petition to set aside the decree of confirmation of this sale on several grounds, among others, and chiefly, because, as they allege, H. A. Foote bought the land as the agent of defendant.

The petition was heard before the Probate Judge and dismissed at the cost of the petitioners, and an appeal taken to the Superior Court.

The case was heard on appeal before his Honor, *Judge Watts,* at chambers, and the judgment of the Probate Court affirmed. From this judgment the plaintiffs (495) appealed.

Busbee & Busbee, for petitioners.
No counsel *contra* in this Court.

SETTLE, J. The defendant as administrator *de bonis non* on the estate of John P. Shearin, after petition and decree to sell the lands of his intestate for the payment of debts, exposed the same to sale on 6 April, 1874, when Mr. Foote bid off the same (819 acres) at the price of $1,410. It is admitted that Foote bid off the land at the request of the administrator and for his benefit.

The sixth paragraph of the defendant's answer is as follows:

"The defendant further says that he reported the said H. A. Foote as the purchaser, whom the defendant had enabled to comply with the terms of the sale in order to avoid complication in making the title; but it was agreed that the defendant should take a title from the said H. A. Foote as soon as it should be made to the latter, and relieve him from all responsibility in relation thereto. This last agreement was subsequent to the sale in pursuance of the understanding previously mentioned."

It appears from the record that the report of the administrator was confirmed on 2 May, 1874, and twenty days thereafter the plaintiffs filed their petition setting forth the facts that one of them is an infant and that they did not know that the administrator was purchasing for his own benefit; that the land is near the railroad, and is worth more than it sold for.

Without looking outside of the administrator's report, it was the plain duty of the Probate Judge to refuse to confirm the same, and indeed he should have then considered the question whether the administrator had shown himself a proper person to be entrusted with the sale of that land.

And when complaint was made the fact that he did not agree, at once, that the sale should be set aside, but en-
(496) deavored to hold on to his bargain, demonstrates that he is an unfit person to exercise the office of administrator, and that he should be removed.

"The most obvious instances of the abuse of a fiduciary character is where a trustee for sale or purchase attempts to buy from or sell to himself. The permitting such a transaction to stand, however honest it may be in the particular case, would destroy all security for the conduct of the trustee; for if he were permitted to buy or sell in an honest case, he might do so in one having that appearance, but which from the infirmity of human testimony, might be grossly otherwise." Adams Eq., p. 60.

The objection to the proceedings in this case is untenable.

It is unnecessary to elaborate this point, since the case of *Hyman v. Jernigan,* 65 N. C., 96, is directly in point, and decides the question presented adversely to the views of the defendant.

PER CURIAM. Judgment reversed and case remanded.

Cited: Wahab v. Smith, 82 N. C., 233; *Stradley v. King,* 84 N. C., 638.

W. S. BURNS v. W. R. ASHWORTH and another.

1. A misjoinder of parties, or a misjoinder of causes of action, is ground of demurrer, and can be taken advantage of in no other way.

2. Under our liberal system of pleading a joinder of unnecessary parties is not fatal, and may be treated as surplusage. And several causes of action may be joined in the same complaint, provided they arise out of the same transaction.

(*Green v. Green,* 69 N. C., 294; *Land Company v. Beatty, Ibid.,* 329, cited and approved).

ACTION, tried before *Tourgee, J.,* at Spring Term,
(497) 1874, of RANDOLPH.

All the facts necessary to be stated are found in the opinion of the Court.

His Honor, on the trial below, dismissed the action, from which judgment the plaintiff appealed.

Scott & Caldwell, for appellant.
Shipp & Bailey, contra.

BYNUM, J. After both defendants had answered the complaint, upon the merits, and the case had come to trial, the defendants moved to dismiss because of the misjoinder of parties defendant, as the case states, but for misjoinder of causes of action, as was insisted here by the counsel of the defendants. We must be governed by the record; but whether the motion was for one or the other cause, the objection could be made by demurrer only. When the demurrable matter does not appear upon the face of the complaint, the objection may be taken by answer. C. C. P., sec. 98. But if it is taken neither by demurrer nor answer, the defendants are deemed to have waived every objection, except as to the jurisdiction and that the complaint does not state facts sufficient to constitute a cause of action. C. C. P., sec. 99. As the defendants did not make the objection by answer or demurrer, but answered over to the merits of the action, to tolerate the motion was to allow the violation of the best principles of good pleading. It was too late to raise the objection by demurrer even, and there is no rule of pleading or practice which allows the objection here made, at any stage of the action. The Court, therefore, should have refused to entertain the motion, C. C. P., 95, 99, as it operates as a surprise to the plaintiff and gave undue advantage to the defendants without the risk of incurring the costs of an unsuccessful demurrer.

If, however, the motion to dismiss is treated as a demurrer, taken in apt time, it has been held expressly that by our liberal system of pleadings the joinder of unnecessary parties is not fatal, and will be treated as surplusage, the costs of such parties falling upon the plaintiff. A defect of parties is ground for demurrer, but too many is surplusage (498) only. *Green v. Green,* 69 N. C., 294.

If the objection of misjoinder of causes of action had been raised by demurrer, it would be equally untenable as the cause is now presented to us. Several causes of action may be united in the same complaint, when they arise out of the

same transaction. C. C. P., sec. 126. *Land Co. v. Beatty,* 69 N. C., 329. The complaint here sets out one entire contract, between the plaintiff and the defendants, and demands relief and a decree as to both defendants. If the allegations of the plaintiff are true, it would seem that he is entitled to the relief he asks, and that both parties defendant are necessary to the complete determination of the matters in controversy. C. C. P., secs. 71, 126. There is error.

PER CURIAM. Judgment reversed and *venire de novo.*

Cited: Williams v. Williams, 74 N. C., 3; *Hoover v. Berryhill,* 84 N. C., 137; *Mining Co. v. Smelting Co.,* 99 N. C., 463; *Warrenton v. Arrington,* 101 N. C., 113; *Hall v. Turner,* 111 N. C., 182; *Wool v. Edenton,* 113 N. C., 35; *Kiger v. Harmon, Id.,* 408; *Carter v. R. R.,* 126 N. C., 444.

WADE v. CITY OF NEW BERN.

Within certain limits the parties may by consent waive the time of complying with the rules for perfecting an appeal, and the Supreme Court will respect such agreements between counsel if they appear upon the record. If such agreement does not so appear, the Supreme Court will adhere to and enforce the rules prescribed in the Code of Civil Procedure.

(*Bryan v. Hubbs,* 69 N. C., 423, cited and distinguished from this).

ACTION, tried before *Clarke, J.,* at Spring Term, 1874, of CARTERET.

The plaintiff, Amos Wade, instituted an action in the Superior Court of Craven County to recover damages for the breach of a contract alleged to have been made between the plaintiff and the defendant, the City of New Bern.
(499) The cause was subsequently removed to Carteret County.

Upon the trial a verdict was rendered in favor of the plaintiff, and the Court gave judgment accordingly. Whereupon the defendant appealed.

The case was decided in this Court upon a question of practice, which is fully set out in the opinion of the Court.

Smith & Strong, for defendant.
Green, for the plaintiff.

BYNUM, J. The law cannot be well administered without rules, and the very purpose of the Code of Civil Procedure is to establish a system of rules which are supposed to be the most conducive to the certain and speedy administration of justice. But it would be destructive of this end if the Court should fail to recognize and enforce the regulations as set forth in C. C. P. for the right government of civil actions in all stages of their progress.

The Code has provided how appeals may be taken and perfected with as much precision as it has provided for the previous stages of the action, by complaint, answer, demurrer, etc. These provisions are contained in C. C. P., secs. 299 to 314, and are briefly as follows:

1. The prayer of appeal and notice, which must be within ten days from the rendition of the judgment in Court.

2. The statement of the case by the appellant, which must be made and copy furnished within five days from the entry of appeal.

3. The exceptions, if any, and return of the case by the respondent to the appellant, which must be within three days from the statement of the case, and copy furnished.

4. If exceptions are filed to the case as stated, by the appellant, the Judge shall appoint a time for settling the case within the judicial district, which shall not be more than twenty days from the time of filing the exceptions.

5. The Judge shall then, within five days, settle the (500) case and file a copy with the Clerk.

6. Within twenty days from that time the Clerk shall make up and transmit the judgment roll to the Clerk of the Supreme Court. So that after giving the parties every delay in perfecting the appeal which The Code allows to the most captious, the whole period of time, from the rendition of judgment to the transmission of the judgment roll to the Supreme Court, is sixty-three days. By C. C. P., sec. 303, "to render an appeal effectual for any purpose, in a civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient sureties," etc. Unquestionably, this undertaking, or appeal bond,

must be filed before the transmission of the case to the Supreme Court, as clearly appears from sec. 314*a*, which requires the undertaking to be made a part of the record sent up, on which judgment will be there rendered, when judgment is given against the appellant.

But the appeal bond must be given at a much earlier stage of the appeal. The law requires no vain thing, and therefore will not require the respondent or the Court to take the time and trouble of settling the case on appeal, leaving it with the appellant to refuse to file the undertaking afterwards, as it may suit his interests or caprice. This clearly appears from sec. 310, which provides that the respondent may except to the sufficiency of the surety on the undertaking *within ten days* after the notice of appeal. As this notice of appeal, by sec. 101, is to be given within ten days from the rendition of the judgment, it thus appears that the undertaking is to be filed within ten days after the judgment is appealed from, and that the filing of the undertaking and contemporaneous notice constitute the foundation of the appeal. As without the undertaking the appeal is nought, so in effect The Code says you must file your bond and give notice of appeal within ten days, or the respondent may proceed to secure the fruits of his judgment. The appellant is allowed ten days to file his appeal bond, by the indulgence of the law, which (501) will not take advantage of the poverty of the appellant or his inability to find sureties on the spot, but will allow him ten days to perfect the undertaking, within which time he will be able, if ever, to procure sureties.

Such seem to be the rules which govern the prosecution of appeals to this Court, as established by C. C. P.—rules which seem reasonable, as they exact no greater degree of vigilance than is required for the deliberate, orderly and sure administration of justice in the courts.

Within certain limits the parties may, by consent, waive the time of complying with the rules for perfecting an appeal, and this Court will respect such agreements between counsel, if they appear on the record. But unless they do so appear, this Court must respect the provisions of The Code, by adhering to and enforcing the rules there prescribed for the government of appeals.

As the record before us shows not only that the undertaking was not filed within the ten days from the rendition of judgment, as The Code requires it to be done, but not until six months thereafter, without any legal excuse for the delay appearing to this Court, the appeal must be dismissed. As, however, the appellant may have such an excuse for the delay as will constitute an exception to the rule, he has leave, upon laying a proper foundation therefor before this Court, to move for a *certiorari* to bring up the case for hearing as on appeal.

The case of *Bryan v. Hubbs,* 69 N. C., 423, has no application in this case, because, there, the question was not, as here, when the undertaking on the appeal should be filed, but the question was as to the undertaking and proceedings which were necessary to suspend the execution after the appeal had been perfected.

PER CURIAM. Appeal dismissed.

Cited: S. c., 73 N. C., 318; *Adams v. Reeves,* 74 N. C., 115; *Rouse v. Quinn,* 75 N. C., 355; *Taylor v. Brower,* 78 N. C., 9; *Sever v. McLaughlin,* 82 N. C., 333; *Wadsworth v. Carroll, Id.,* 334; *Hutchinson v. Rumfelt, Id.,* 428; *Walton v. Pearson, Id.,* 466; *Hutchinson v. Rumfelt,* 83 N. C., 442; *Parker v. R. R.,* 84 N. C., 120; *Scroggs v. Alexander,* 88 N. C., 67; *McCanless v. Reynolds,* 90 N. C., 649; *s. c.,* 91 N. C., 246; *Boyden v. Williams,* 92 N. C., 546; *Wiley v. Logan,* 94 N. C., 566; *Simmons v. Andrews,* 106 N. C., 203; *Graves v. Hines, Id.,* 327; *S. v. Price,* 110 N. C., 602; *Glanton v. Jacobs,* 117 N. C., 428.

(502)

ROBERT HAMLIN v. JOHN H. TUCKER.

A plaintiff may in the same complaint join as separate causes of action, (1) the harboring and maintaining his wife; (2) the conversion of certain personal property, to which the plaintiff is entitled *jure mariti;* (3) inducing the wife while harbored and maintained to execute to defendant a deed for land, under which he had received the rents, and (4) converting to defendant's own use certain mules, farming utensils, etc., set out in a marriage settlement executed by plaintiff and his wife.

ACTION, tried before *Hilliard, J.,* at Fall Term, 1874, of BERTIE.

The defendant demurred to the complaint of the plaintiff for the misjoinder of several causes of action. His Honor, on motion of the plaintiff, overruled the demurrer, and the defendant appealed.

The facts necessary to an understanding of the case are stated in the opinion of the Chief Justice.

D. C. Winston and *Smith & Strong,* for appellant.
P. H. Winston, Jr., contra.

PEARSON, C. J. There is no error in the ruling of his Honor by which the demurrer was overruled.

The demurrer is put on the ground of a misjoinder of actions, in this: The complaint sets out in the first instance a cause of action for "harboring and maintaining the wife of the plaintiff."

In the second instance, a cause of action for converting certain personal property, not embraced by the marriage settlement, to which the plaintiff was entitled *jure mariti.*

In the third instance, a cause of action for inducing the wife of plaintiff, while harbored and maintained, to execute to the defendant a deed for land, under which he had received the rents.

(503) In the fourth instance, a cause of action for converting to his own use certain mules, farming utensils, etc., set out in a marriage settlement, executed by the plaintiff and his wife.

In our opinion the case is embraced by C. C. P., sec. 126: "The plaintiff may unite in the same complaint several causes

of action, whether they be such as may have heretofore been denominated legal or equitable, or both, when they all arise out of—

"1. The same transaction, or transactions connected with the same subject of action," etc. The purpose being to extend the right of plaintiffs to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough to cover all causes of action which a plaintiff may have against a defendant arising out of the same *subject* of action, so that the Court may not be forced "to take two bites at a cherry," but may dispose of the whole subject of controversy and its incidents and corrollaries in one action. Should the action become so complicated and confused as to embarrass the Court in its investigation, the remedy furnished is that the Court may *ex mero motu* refuse to pass upon matter not germane to the principal subject of action.

Here, according to the admissions of matters of fact made by the demurrer, the subject-matter of controversy cannot be settled without deciding, not merely whether the defendant enticed the plaintiff's wife to leave him, and harbored and maintained her in violation of his conjugal rights, but whether he did not also, as a part of his interference with the marital right of the plaintiff, induce her to allow him to carry off and convert her paraphernalia, wardrobe, bookcase, cottage furniture, etc., and whether he did not by reason of her dependent position, induce her to execute a deed for her land, and thereby frustrate the purpose of the marriage settlement or to put such a cloud upon his rights under it as to entitle the plaintiff to the aid of the Court as connected with or germane to the charge of having enticed his wife to abandon him, and harbored and maintained her in her resistance to his lawful authority.

PER CURIAM. Judgment affirmed. (504)

Cited: Young v. Young, 81 N. C., 96; *Bank v. Harris,* 84 N. C., 212; *Outland v. Outland,* 113 N. C., 75; *Pretzfelder v. Ins. Co.,* 116 N. C., 496; *Solomon v. Bates,* 118 N. C., 316; *Daniels v. Fowler,* 120 N. C., 16; *McGehee v. Tucker,* 122 N. C., 189; *Sloan v. R. R.,* 126 N. C., 490; *Fisher v. Trust Co.,* 138 N. C., 230, 237, 246.

M. EUGENIA ALLEN and others, infants, v. W. H. SHIELDS, administrator, and others.

1. The homestead law applies to debts contracted prior to its adoption; and by sec. 3, Art. X, of the Constitution, the right to a homestead is given to the minor children of an insolvent father, regardless of their pecuniary circumstances.

2. Whether since the Act of 1871-'72, ch. 95 (Battle's Revisal, ch. 17, sec. 59), a valid sale of an infant's land can be made without a personal summons—*quære.*

3. When an administrator sells land by an order of Court to pay the debts of his intestate, he must lay off a homestead for the parties entitled thereto. His failure to do so does not affect their right to such homestead.

(*Hill v. Kessler*, 63 N. C., 437, cited and approved).

PETITION for a homestead by infants, to a justice of the peace, and carried by appeal to *Watts, J.*, before whom it was heard at chambers, in HALIFAX, 4 August, 1874.

The facts are agreed and are fully set out in the opinion of the Court. His Honor, on the hearing before him, granted the prayer of the petitioners, whereupon the defendants appealed.

Moore & Gatling and *Hill,* for appellants.
Conigland, contra.

RODMAN, J. The plaintiffs are the minor children of James V. Allen, who died intestate and insolvent, seized of certain lands, in November, 1871. They claim a (505) homestead in their father's lands in the county of Halifax. Their claim is disputed by the defendant Shields, who is the administrator of the deceased, and by the two other defendants, Gregory and Manly, who are the creditors of the deceased, and who also severally purchased portions of his land as hereinafter stated.

The grounds of their defense are these:

1. That the debts of the deceased to said Gregory and Manly, respectively, were contracted before the adoption of the present Constitution in 1868. That Daniel & Gregory recovered a judgment against the deceased, which was docketed in Halifax in 1870.

2. That the plaintiffs inherited from their mother, who died before their father, and owned at his decease lands worth about $3,000.

3. That in 1873 the administrator brought a special proceeding for the sale of the lands of his intestate for the purpose of paying his debts, to which the present plaintiffs were duly made parties defendant, by service on their guardian, one Martha Clark, who failed to appear, whereupon the Court appointed a guardian *ad litem*, who appeared and admitted the allegations of the complaint. It does not appear that there was ever any personal service on the infants. Nevertheless, the Court ordered the sale of the lands, and they were accordingly sold in January, 1874, when Gregory purchased one tract and Manly another, but no deeds have yet been made to them, and it does not appear that the sales have been confirmed.

The Justice before whom the petition for the homestead was originally heard decided in favor of it, as did the Judge of the Superior Court, when it was brought before him upon appeal.

1. The first objection is conclusively answered by the case of *Hill v. Kessler,* 63 N. C., 437, to which it is only necessary to refer.

2. Art. X, sec. 3, of the Constitution says: "The homestead after the death of the owner thereof shall be exempt from the payment of any debt during the minority of his children, or any one of them." (506)

There is no *proviso* that it shall not be exempt if the children otherwise own homesteads, as there is in the case of a widow, by sec. 3. The Constitution, taken literally, gives the right to a homestead to all the minor children of an insolvent father, without inquiry into their circumstances, and there is no reason why we should curtail it. We consider it of no importance whether or not there was a habitable or comfortable dwelling on the lands of which the plaintiffs were seized by descent from their mother. The homestead must include the dwelling of the owner thereof, if there be one; but a homestead may be had of unimproved land. Otherwise, the poorest and most needy class of all, viz., those who have small bits of land which have no buildings of any sort on them, would be excluded from the benefit of the act.

Homestead is analogous to dower. A doweress is entitled to the mansion as a part of her dower. But if the husband dwelt in a house in which he had only a term of years or a life estate, she is nevertheless entitled to dower out of all the lands he was seized of, whether they were improved or not.

3. The third objection turns upon the point that the plaintiffs have lost their right through the fraudulent or negligent failure of their regular guardian, or of their guardian *ad litem,* to claim it in apt time. If we were compelled so to hold, it would illustrate the value of the safeguards which were thrown around infants by sec. 59 of C. C. P. This section seemed to some of the profession to put on them a needless labor and to interpose a needless delay in subjecting the estates of infants to sale. Probably under this idea the Legislature repealed the section by the Act of 1871-'72, ch. 95 (Bat. Rev., ch. 17, sec. 59). We think there is no member of the bar who does not know from his own observation in the course of his practice how dangerous it is to leave the rights of infant defendants to be protected by a guardian appointed *ad litem,* upon the suggestion of the adverse party, (507) and without any personal service of the summons on the infant. Too often such an appointment is, to use the language of an old lawyer quoted by Blackstone, *"committere agnum lupo."*

We should be reluctant to hold that the Act of 1871-'72 reintroduced and legalized a practice which to some extent prevailed in some of the old county courts, by which personal service on an infant of whatever age was dispensed with, and on the filing of a petition to sell his land for partition, or for any other purpose, the Clerk of the Court was appointed a guardian *ad litem* to bind the infant by his answer. Such an appointment was of course merely formal; the Clerk put in any answer that was prepared for him; it was merely a part of a judicial ceremony by which the infant was deprived of his estate. I am informed that *Judge Ruffin* once, after he had ceased to be Chief Justice of this Court and had become a Justice of the County Court of Alamance, indignantly protested against this practice, when he found it existing in that Court, as mischievous and illegal. Personal service was indispensable by the common law; it was a check upon fraud which cannot be safely removed; and it may be doubted

whether a valid sale of an infant's land can be made without it, even since the Act of 1871-'72.

It is unnecessary, however, to decide this point, for we think that notwithstanding the neglect of the guardian to set up the rights of the infants to a homestead in defense to the action by the administrator to sell the lands, that their rights in that respect have not been lost.

It is true that the law makes no provision that an administrator, before selling lands to pay the debts of the intestate, shall have the homestead of the infant heirs laid off, as it does in the case of a sheriff who levies upon land under an execution. (Bat. Rev., ch. 55, sec. 1).

It would seem from the analogy of the case of an administrator to that of a sheriff, that he should do so. But if he neglects the duty, his sale, like that of a sheriff under an execution, must be only of such estate of the debtor as may lawfully be sold. The purchaser must inquire (508) into all adverse equities affecting the estate, and in like manner into the rights of the children or widow to a homestead.

PER CURIAM. Judgment affirmed.

Cited: Moore v. Gidney, 75 N. C., 39; *Shields v. Allen,* 77 N. C., 376; *Nicholson v. Cox,* 83 N. C., 46; *Simpson v. Wallace, Id.,* 482; *Young v. Rollins,* 91 N. C., 362; *Cates v. Pickett,* 97 N. C., 27.

STATE on the relation of JACOB P. GOODMAN and others v. M. L. S. GOODMAN, exr., and others.

1. Where after the death of an administrator and before the appointment of an administrator *de bonis non*, the next of kin brought an action upon the administration bond: *Held*, that the estate was in abeyance, and neither the next of kin nor any one else except an administrator *de bonis non*, had a right of action against the bond of the original administrator.

2. In such case, after action brought, the Superior Court has no power to amend the pleadings by striking out the names of the relators and inserting that of an administrator *de bonis non* subsequently appointed.

(*State v. Britton*, 33 N. C., 110; *Davis v. Evans*, 27 N. C., 255; *State v. Johnston*, 30 N. C., 381, cited and approved).

ACTION, upon the bond of an administrator by next of kin, tried before *Schenck, J.*, at Fall Term, 1874, of CABARRUS.

At the commencement of the suit there was no administrator *de bonis non* on the estate of first intestate, and none was appointed until the trial term of the Court, when the plaintiff was appointed by the Probate Judge.

At the return term of the writ the plaintiffs' counsel moved to strike out the relators from the complaint and insert (509) the name of the administrator *de bonis non*, when he should be appointed. This motion was continued until the trial term, when it was renewed after the plaintiff was appointed.

This motion the Court allowed, and the defendants appealed.

Bailey and *Montgomery*, for appellants.
Craige & Craige, *contra*.

BYNUM, J. This is an action on the administration bond of Elizabeth Goodman, who was the widow and administratrix of Levi Goodman, and had died, leaving the estate of the intestate not fully administered. This action was begun by the next of kin of Levi Goodman, upon the bond of Elizabeth, deceased, to recover their distributive share of the estate of Levi Goodman.

The action was commenced in May, 1874, and at that time there was no administrator *de bonis non* upon the estate of

Levi Goodman. At the return term the defendants filed a demurrer to the complaint, for want of parties plaintiff, and at the same term the plaintiffs moved for leave to amend by making the administrator *de bonis non* a party plaintiff, when one should be appointed. This motion was continued to the Fall Term, 1874, at which term the Court of Probate appointed Michael Goodman administrator *de bonis non,* and by the order of the Court he was made a party plaintiff and the pleadings were allowed to be amended so as to conform thereto; from which order the defendants appealed. In the case of the *State v. Johnston,* 30 N. C., 381, it was held that where an administrator dies without having fully administered the estate of his intestate, an action will not lie by one of the next of kin for his share of the estate, against his administrator, but must be brought by the administrator *de bonis non* of the original intestate. So in the *State v. Britton,* 33 N. C., 110, a case precisely like the present, where the next of kin brought their action upon the bond of the deceased administrator, it was held that the action would not lie, but must be brought by the administrator *de bonis non.*
This seems to be conceded by the plaintiffs, and to (510) cure the defect of parties they were allowed to amend as before stated. Had the Court the power to allow the amendment?

The power of an executor is derived from the will, while that of an administrator is derived from his letters of administration. An executor can bring an action before probate, but an administrator can do no act and bring no action until his appointment. Until the appointment of an administrator *de bonis non* of the original intestate, Levi Goodman, the estate was in abeyance, and neither the next of kin nor any one else had a right of action against the defendants. 1 Williams Exrs., 353. It is clear that for particular purposes letters of administration have relation back to the death of the intestate; as, for example, the administrator may have an action of trespass or trover for goods of the intestate taken by one before letters granted; but, certainly, he could bring no action before he acquired title, and before he had an existence, even, as an administrator, for it is a universal rule of pleading that a party must have a right before he begins his action. An action on a title by relation is one thing, and an action begun

without any title at all is another. The powers of amendment vested in our courts by The Code are quite extensive, but the decided cases here or elsewhere do not go the length claimed by the plaintiffs. In the chancery case of *Humphrey v. Humphrey,* 3 P. Wm., 351, after bill filed by the next of kin, *Lord Talbot* allowed the bill to be amended by making the administrator a party plaintiff, although he had been appointed pending the suit; but it was placed upon the ground that the bill was for an account, and the next of kin were entitled to an account, although the administrator was a necessary party for complete relief. That case is unlike this, in that here the next of kin are improper parties, and are entitled to no account or other relief in this action upon the administration bond. The sole right of action is in the administrator *de bonis non.* In the subsequent case of *Brown v. Higden,* 1 Atk., 291, before *Lord Hardwicke,* before
(511) the cause was heard the defendant, administratrix, died and her husband took out letters *de bonis non* upon which the plaintiff amended his bill against the husband, to which amendment the defendant demurred. There the plaintiff cited the case, 3 P. Wm., where the bill charged, by way of amendment, matters which arose after filing of the bill. But the *Lord Chancellor* said: "I am of opinion the demurrer ought to be allowed, *for I take it to be the constant rule, that matters subsequent to the original bill must come by way of supplemental bill and review.*" And such seems to be now the settled law in England. In this State the point is substantially settled in the same way in the case of *Davis v. Evans,* 27 N. C., 525. That was an action of ejectment, one count of which was on a sheriff's deed executed after action begun, on a sale made before the suit was commenced. It was there held that "whatever relation to the time of sale a conveyance from the Sheriff may have for some purposes, it cannot be carried to the extreme of proving the title in an action that was brought before the deed was made." This case would seem to dispose of the question. The suit was begun by the next of kin, who had no right of action, and the attempt is to make that good by adding as a party a person who himself had no existence and no right of action when the suit was commenced.

Suppose the amendment is allowed, would the administrator be bound by depositions previously taken in the cause, or by an account taken, or for costs improperly incurred? Or could the defendants hold the administrator to any admissions or agreements of the plaintiffs, made in the progress of the cause? It is perfectly clear that the rights and duties of the administrator *de bonis non* are distinct from and independent of those of the next of kin, and may be totally adverse. His duty is to hold all at arm's length, to reduce the estate into possession and to administer it in due course of law. The plaintiffs, being the next of kin, could make no demand on the defendants, for they owed no duty to them; nor could the defendants make any settlement of the estate before the action, for there was no legal (512) representative of the estate to receive payment or to discharge them. They were, therefore, sued when they were in no default to the plaintiffs, and when no person existed who could legally make a demand or give a discharge. The power of amendment cannot go to that extent.

There is error. The order is reversed, the demurrer allowed, and the action is dismissed.

PER CURIAM. Action dismissed.

Cited: Ham v. Kornegay, 85 N. C., 122; *University v. Hughes,* 90 N. C., 539, 541; *Hardy v. Miles,* 91 N. C., 134; *Merrill v. Merrill,* 92 N. C., 661; *Brooks v. Holton,* 136 N. C., 307.

ROBERT FAUCETT v. ELIAS BRYAN.

1. If A buys the property of B, but in his own name, A has the legal title, holding it in trust for B; and under our former system equity would compel a conveyance from A, upon B's doing what was required of him.

2. When a defendant, upon the request of the plaintiff, bought in his own name the property of the plaintiff at a sale by the United States Marshal, under an agreement that the plaintiff should have the property upon a subsequent settlement: *Held*, that the defendant was no agent of the plaintiff, but held the property in his own name until it was divested by the plaintiff's performing his part of the agreement.

ACTION for the conversion of a still, tried before *Kerr, J.*, at Fall Term, 1874, of CHATHAM.

In his complaint the plaintiff alleged that he was the owner of a certain still, and that the defendant converted the same to his own use. The defendant's answer denies the allegations of the complaint, without exception.

On the trial the following facts were established:

In June, 1870, one Black purchased of defendant his interest in the still, at the time being on a lot in Haywood over which the plaintiff exercised ownership. At this sale the de-
fendant informed Black that he would not deliver the
(513) still, nor have anything to do with his getting it, as
the plaintiff laid some claim to it, and he (the defendant) would have no fuss or difficulty with him (the plaintiff) about it. A short time after this Black went with Everett Bryan, a son of the defendant, and a colored man named Dave Cotton, and removed the still from the lot upon which it had been standing. Of this defendant had no knowledge, nor did he know of the removal of the still until it was brought to his store, where Everett proposed to lease it, but defendant forbade it, when Black set it down in the street, a few feet from the storehouse of defendant, and there left it. Afterwards Everett Bryan took the still and put it over a fence into a lot, of which it was said defendant had control, although he did not own it. Everett Bryan was of full age, and not under the control of the defendant, his father. His brother, Mack Bryan, was working his father's plantation that year, and had control of the stock, etc.

The still was afterwards set up on the plantation of defendant, which was under the control of the son, and some of the fruit growing thereon was distilled. Of this defendant was ignorant, and as soon as he heard of it he directed the still to be removed. Black was a blacksmith and worked for defendant and others. He afterwards removed the still to Moore County.

The plaintiff, in his own behalf, testified that he owned and used the still in 1866-'67; that he became indebted to the United States Revenue Department for taxes, and that the still and fixtures, the land upon which it was, and some other property was sold to pay those taxes. That he had distilled for many of his neighbors, among others the defendant, who had failed to pay him for the taxes he had to pay on their liquor, which had caused his delinquency. The day on which the still was sold by the United States Marshal the defendant came to him, the plaintiff, and asked him if he had spoken to any one to befriend him at the sale. The plaintiff informed him he had not, and told defendant that he thought it was hard that his property should be sold for the taxes he was compelled to pay for his neighbors, when they (514) would not pay him. That defendant said that he owed him, the plaintiff, something for distilling, and that he would then pay it. Plaintiff then proposed to defendant to buy the property, and that he would make it all right on their settlement. This was agreed to, and at the sale the defendant bought in his own name, the still, land, etc., for $63.

In March, 1867, the plaintiff went to defendant's house to settle; that they attempted to settle, but owing to some disagreement and the anger of the defendant, the attempt failed. That upon a settlement, the defendant would probably owe him about five dollars. The property bid off by defendant remained in the possession of the plaintiff until the still was removed. Some of it was consumed by plaintiff.

The Court instructed the jury, amongst other things, that if the defendant bid off the property of the plaintiff at the sale, at his request, and under the circumstances deposed to by the plaintiff, then he became his agent, and his acts at the sale inured to the benefit of the plaintiff. That the sale to Black was illegal, and rendered defendant equally liable with

Black in the conversion of the property. That his refusal to deliver the still and his subsequent action did not relieve him, the defendant, from responsibility.

The jury returned a verdict for the plaintiff. Motion for a new trial; motion overruled. Judgment, and appeal by defendant.

Howze, Tourgee and *Gregory,* for appellant.
Battle & Son, contra.

READE, J. Under the old system, if A bought property for B, but in his own name, A had the legal title; but he held it in trust for B, and equity would compel a conveyance upon B's doing whatever equity required of him. The principles are the same under the new system; but the remedies are all embraced in one action. So that, if it be true, as alleged by the plaintiff, that the defendant bought the property (515) for the plaintiff, but in his own name, it would not vest the title in the plaintiff, but in the defendant, subject to be divested upon the plaintiff's doing whatever equity might require him to do. If that were not so, see what might be the hardship upon the defendant. The plaintiff's property is about to be sold by the Sheriff for debt. The defendant says to plaintiff: "I owe you $100, and I would be very glad to befriend you." "Very well," says the plaintiff, "buy the property, and we will make it all right on a settlement." The defendant buys the property and pays $500 for it, in his own name. Now, under the old system the defendant would have the legal title, and the plaintiff would have an equity to call for the legal title upon his paying to the defendant $400. Can it be that it is reversed under the new system, and that the title instantly vests in the plaintiff, and the defendant is driven to his action for reimbursement of his $400? There is no such change; but the rule is the same as heretofore.

We do not agree with his Honor that the transaction testified to by the plaintiff constituted the defendant the agent of the plaintiff to buy the property for him, and that the title vested immediately in him. On the contrary, we are of the opinion that the proper construction is that the defendant was to buy it for himself, and his own name, but to be subse-

quently transferred to the plaintiff upon an adjustment of their accounts.

Our conclusion is that the plaintiff is not entitled to recover the property until he accounts with the defendant. If there is nothing due the defendant, then the plaintiff is entitled to recover the property. If there is anything due the defendant, then the plaintiff will be entitled to recover the property upon his paying what is due: the equitable as well as the legal rights of the parties being administered in this action.

When the terms of a contract are *ascertained,* its construction is for the Court. When not ascertained, it has to be left to the jury with instructions. It is not necessary for us to decide whether the terms were so ascertained as that his Honor could construe it, or whether he ought to (516) have left it to the jury; because if we take the contract to be in the very words of the plaintiff, we think his Honor misconstrued it, and we should have to give a new trial; and if he ought to have left it to the jury, but did not, the result must be the same.

PER CURIAM. *Venire de novo.*

WILLIAM PATTERSON and others v. R. M. MILLER, admr., etc.

1. A special proceeding, under sec. 73, ch. 45, Battle's Revisal, differs from a creditor's bill, in that in the latter all the creditors *may* make themselves parties, while in the former they *are required* to do so.

2. A Judge of Probate has no power to make to himself an allowance "for his services in stating an account"; nor has he the power to make an allowance to the attorneys of the creditors for services in their behalf.

3. The cost in such proceedings must abide by the provisions of ch. 105, Battle's Revisal.

SPECIAL PROCEEDINGS by creditors against an administrator, commenced before the Probate Court of MECKLENBURG, and heard upon appeal by *Schenck, J.,* at chambers, 11 January, 1875.

The material facts are stated in the opinion of the Court. From the decree made by his Honor on the hearing, the plaintiffs appealed.

Wilson & Son, for appellants.
Barringer and *Dowd, contra.*

PEARSON, C. J. This is a special proceeding by a creditor against the administrator of a debtor, under the Act of 1871-'72. See Bat. Rev., ch. 45, sec. 73.

(517) This statute institutes a proceeding differing from any that had ever before been used either in courts of law or in courts of equity for the purpose of compelling the settlement of the estates of deceased persons, and is a necessary sequence to the change of the law by which creditors are to be paid *pro rata.*

This special proceeding differs widely from a creditor's bill: The one is a suit in equity, brought before the Chancellor by a creditor, and all other creditors who *choose* to come in and make themselves parties and become liable for a *pro rata* part of the costs. The other is a proceeding before the Judge of Probate, instituted by a creditor, by which the other creditors *are required* to come in and prove their debts. So it bears a nearer analogy to the proceeding before a commissioner in bankruptcy, who calls on the creditors to prove their debts, and makes dividends from time to time; but it is in fact a proceeding *sui generis,* and depends entirely upon the statutory regulations. It follows that all of the cases cited on the argument in regard to equity practice in respect to costs have no application, and we are left to a construction of the statutes.

The question intended to be presented by the appeal is whether the allowances made by the Probate Judge should be paid by the creditors or should be a charge upon the fund; but before reaching this question we are met by the more important question, Has the Judge of Probate power to make an allowance to himself "for his services in stating the account and making the report," and an allowance to the attorneys of the creditors "for their services in this behalf"?

The Judge of Probate may be at liberty to pass as a voucher the amount paid by the administrator to his counsel, in man-

aging the estate; about this we are not called on to express an opinion. But we can find no law by which he is authorized to make an allowance to *himself* for services in the discharge of the duties of his office. This, of itself, suggests the difference between "a creditor's bill," where the Chancellor makes such allowance, and "a special proceeding," where, if any allowance can be made, it must be by introducing the anomaly of a man estimating the value of his own services; and we can find no law by which a (518) Judge of Probate can make an allowance to the attorney of the creditors for their services in aiding them and in aiding him in stating the accounts. So we conclude that is a matter to be agreed on by the creditor who institutes the proceeding and his attorney, and in the absence of any provision by statute, it is left to the conscience of the other creditors, how far a sense of justice will permit them to take benefit from another man's outlay without making a *pro rata* contribution.

The Code of Civil Procedure, title XII, "Of the costs in civil actions," made very liberal allowance for costs; so much so, indeed, that it was objected to, and was repealed by Act 1870-'71, and we are now left to abide by the provisions of that act set out in Bat. Rev., ch. 105, "Salaries and Fees." In sec. 29 of that chapter it is provided, "Fees of Attorneys: 1. In all cases in the Superior Court. 2. In all cases in the Supreme Court. 3. In other cases in the Superior Court including petitions, and in all *cases of petition* in *special proceedings* in the *Superior and Probate Courts, four dollars.*"

These are the fees allowed by law. When the questions are grave and the labor is great, the attorney and client are left to their special contract. There is error.

PER CURIAM. . . . . Judgment reversed.

Cited: Mordecai v. Devereux, 74 N. C., 674; *Pegram v. Armstrong,* 82 N. C., 330.

(519)

KELLY W. DAVIS v. S. GLENN and another.

A note dated 15 August, 1864, payable six months after date, in current funds, when called for, became due at the end of six months from date, and was subject to the legislative scale.

(*Howard v. Beatty*, 64 N. C., 559; *McKesson v. Jones*, 66 N. C., 238; *Ormond v. Moye*, 33 N. C., 664, cited and approved).

ACTION for the recovery on a note of hand, tried by his Honor, *Judge Kerr*, at Fall Term, 1874, of GUILFORD.

The case had been submitted to referees, who found for the plaintiff. This finding was affirmed by the Judge of the Superior Court, when the defendants appealed.

The facts are sufficiently set out in the opinion of *Justice Rodman*.

Mendenhall & Staples, Shipp & Bailey, for appellants.
W. P. Caldwell and *Collins, contra*.

RODMAN, J. This was an action to recover on a note in the following form:

Six months after date we promise to pay K. W. Davis four hundred and twenty dollars in current funds when called for.

S. B. GLENN, [SEAL.]
15 August, 1864. JAMES DAVIS. [SEAL.]

There was no proof as to what was the consideration of the note. No demand for payment was made until after the close of the war, and there was no tender of payment.

The question is whether the note is subject to the scale.

The difficulty in applying the law to the contract arises from the uncertainty as to what time the phrase "current funds" was meant to apply to: whether to time of the making of the note, or of its maturity, or of the demand of payment after its maturity.

(520) Of the numerous cases on Confederate contracts in our recent reports, not one exactly resembles this. In *Howard v. Beatty*, 64 N. C., 559, the note sued on was dated 3 April, 1865, payable at twelve months in current money. It was made and became payable during the war, and there was no ground to take it out of the scale.

In *McKesson v. Jones,* 66 N. C., 259, the note was dated 14 November, 1863, and was payable two years after date in the current funds of the country *when due,* which phrase clearly made it payable, under the circumstances, in United States currency.

It must be confessed that the construction of the present instrument is very uncertain. We are of opinion, however, that the note became due at the end of six months from its date; after that period it became like a note originally made payable on demand: it bore interest; the debtors were at liberty to tender payment of it; it could be sued on without a demand. We do not think it resembled the note in *Ormond v. Moye,* 33 N. C., 364, which was to be paid *when presented.* A note payable *on demand* has from an early period received with us a different construction from a bill payable at sight, or on other like condition. It follows from this that the words "current funds" mean Confederate money, and that the note under our legislation must be scaled at its date. The only objection to this construction is that it gives but little weight to the words, "when called for." Probably they were understood to mean no more than to remove from the debtor the obligation of seeking the creditor to make payment, the creditor taking the duty of calling for the money on himself. It has been held in Virginia that a note which becomes payable on a day which happens to be after the war "in current funds," was subject to their scale. *Sexton v. Windell,* Grat., 534.

We consider it unnecessary to consider the motion made on affidavits to vacate the judgment.

PER CURIAM. Judgment reversed, and *venire de novo.*

Cited: Brickell v. Bell, 84 N. C., 84.

(521)

STATE v. JAMES FREEMAN and ALEXANDER STEWART.

On the trial of an indictment for stealing a national bank note and a United States Treasury note, evidence that the witness *believed* that it was a national bank note will support a verdict of guilty.

(*State v. Collins, ante,* 144, cited and distinguished from this).

INDICTMENT for larceny of bank and United States Treasury notes, tried before *Buxton, J.,* at Fall Term, 1874, of ANSON.

The defendants, together with one Glascoe Williams, were charged in the indictment:

* * * "One treasury-note, issued by the Treasury Department of the government of the United States, for the payment of five dollars, of the value of five dollars; one national bank note, for the payment of five dollars, of the value of five dollars; issued by a national bank doing business within the United States, the precise location and name of which are to the jurors aforesaid unknown; one national currency bill of the denomination and value of five dollars," and so on, varying the charge.

On the trial, the prosecutor swore that he was at a neighbor's, near the road, when the prisoner Stewart came up, having in his hand a little brass lock; after inquiring the way to a place unheard of by the witness, he, the prisoner, proposed to bet that the witness could not open the lock. Witness declined to bet. While the two were talking about the lock the other defendants, Freeman and Glascoe Williams, came up. They appeared to be strangers to Stewart, although the witness had seen them following, when the first came to where he was. Williams soon after he came up took the lock in his hand and remarked that no one could open it; and returned the lock to Stewart, who said: "I will bet any amount that I can open it." Williams took out a bill to bet, when Stewart remarked that he had no money; upon which Williams said that made no difference, as his was counterfeit, and asked the witness if he had any money about him, so that he

(522) could compare it with his. Witness took out a five-dollar bill for the purpose of making a comparison; he could not say positively, *but thought it was a national bank*

note. Witness was not certain whether it was a treasury-note or a national bank note; he knew the difference. If it was a bank-note, he could not say on what bank it was. It was of the same character as the bill now exhibited to him. (Counsel showing a national bank bill).

Upon taking the bill out of his pocket, Williams, the defendant, not now on trial, grabbed it out of the hand of the prosecutor and jumped back four or five steps. Witness demanded the bill. Williams smiled and made off, the two others following in a fast walk. Witness went to the house to get a gun, but found it unloaded. The parties escaped.

There was other evidence tending to prove a conspiracy, and that the parties indicted knew each other.

The jury returned a verdict of guilty, whereupon the defendants moved to arrest the judgment on the ground that the indictment failed to charge that the bill taken was issued by some particular bank. Motion overruled. Judgment, and appeal by defendants.

No counsel in this Court for the defendants.
Attorney-General Hargrove, for the State.

READE, J. In the case of *State v. Collins, ante,* 144, the witness could not say whether it was a bank-bill or treasury-note that was stolen; and, therefore, the defendant could not be convicted. But in this case the witness said: "I cannot say positively, but I think it was a national bank note." From this the jury might find that it was a bank-note; and the conviction was right.

There were other exceptions by the defendants, and also a motion in arrest of judgment; but there is no force in them.

PER CURIAM. No error.

(523)

WIMBISH & CO. v. C. C. MILLER and others.

1. When the consideration for a promise to pay is property purchased by the debtor during the war, the vendor is entitled to recover the value of such property at the date of the sale in gold, or its equivalent in the legal tender of the United States.

2. Payments in Confederate money are to be deducted at their nominal value from the sum owing; the value of the residue being ascertained upon the above principle.

3. The fact that a mortgage was given to secure the payment of the residue makes no difference in ascertaining the amount of the debt.

(*Robeson v. Brown*, 63 N. C., 554, cited and approved).

CONTROVERSY, submitted without action, heard by *Cannon, J.*, at chambers, in JACKSON, upon the following facts:

The parties to this action agree to the following statement of facts, and submit them to the Court for its judgment thereon:

On 16 February, 1865, the defendant C. C. Miller purchased from one Woodford Zachary ten thousand two hundred and sixty-nine acres of land situated in Jackson County, at the price of thirty thousand eight hundred and seven dollars, Confederate money, and paid down, in Confederate money, eleven thousand two hundred and thirty-three dollars. Thereupon Zachary executed and delivered to the said Miller a deed of conveyance for the lands, and Miller executed and delivered to him a mortgage on same lands, to secure the balance of the purchase money.

Subsequently Zachary transferred and assigned the mortgage to other parties, and they transferred and assigned the same to the plaintiff. The mortgage was duly registered in Jackson County and the assignments thereof are properly and regularly registered.

It is further agreed that the defendants, Alfred Voorhis, Mary E. Martindike, Charles Voorhis, Emily Voorhis, and Thomas Voorhis have acquired the interest of the said Miller in the said lands and are entitled to redeem them from (524) the mortgage.

The plaintiffs are, and were at the time of these transactions, citizens and residents of the State of Virginia, the defendants residents of the State of New Jersey.

This action is brought to foreclose the mortgage, the plaintiffs claiming that the value of the mortgage is the value of the land, deducting the value of the payment heretofore mentioned. The defendants insist that they are entitled to redeem upon paying the scale value of the Confederate money at the date of the mortgage.

If the Court shall be of the opinion with the plaintiff, it is agreed that a jury shall be impaneled and a reference made to ascertain the value of the land, and they will be entitled to receive that amount with interest, less the value of the payment made by Miller.

But if the Court shall be of the opinion with the defendants, then the plaintiff will only be entitled to recover the scale value of the Confederate money at the date of the mortgage and interest thereon to day of payment.

The Court gave judgment in favor of the plaintiff, and thereupon the defendants appealed.

Coleman and *Carter,* for appellants.
A. T. & T. F. Davidson, contra.

RODMAN, J. The several acts of Assembly on the subject of debts contracted during the war, which are too familiar to need any special reference, and the numerous decisions of this Court on the meaning of those acts, establish this rule: If the consideration for the promise to pay was property purchased by the debtor, the vendor is entitled to recover the value of the property at the date of the sale, in gold, or its equivalent in the legal tender of the United States. *Robeson v. Brown,* 63 N. C., 554.

If a part of the price was paid in Confederate money, such payment is to be deducted at its nominal value from the sum owing; it is a payment *pro tanto* upon the (525) debt, and the residue only is owing, the value of which is to be ascertained upon the same principle. If, for an easy example, land worth $6,000 was sold for $30,000, and one-half or $15,000 was paid, the purchaser would owe one-half the value of the land, or $3,000 in gold, with interest, or its equivalent, as aforesaid. The fact that a mortgage was given

to secure the payment of the residue can make no difference in the amount of the debt.

This is the only question presented by the case agreed, and under the agreement the case is remanded, in order that the value of the land may be ascertained, and the case otherwise proceeded in in accordance to law. The plaintiff will recover costs.

PER CURIAM. Remanded.

Cited: Duke v. Williams, 84 N. C., 77.

BENTON UTLEY v. F. C. H. PETERS.

Upon a motion to be allowed to defend after judgment, under sec. 85, ch. 17, Bat. Rev., the facts in the case must be found by the Court in which the motion is made.

(*Clegg v. Soapstone Co.*, 66 N. C., 391, cited and approved).

SPECIAL PROCEEDINGS, tried before *Tourgee, J.,* at Spring Term, 1874, ORANGE.

This was a motion under sec. 85, C. C. P., to be allowed to defendant after judgment, and asking a writ of *recordari* to bring up certain proceedings before a magistrate necessary to defense against the judgment, and also to cancel a deed made by the Sheriff of Orange to one S. M. Barbee, conveying certain property sold under execution.

(526) The case was heard upon affidavits, and among others filed in the case the defendant filed the following:

F. C. H. Peters, being duly sworn, says:

1. That during the years 1865-'66-'67 the plaintiff sold and delivered goods to her husband, Osmond Peters, and the bill for the same was presented against him.

2. That defendant did not agree to charge her property for said debt.

3. That she did not receive notice of any judgment against her until some time during the month of May, 1873, and then she learned it only indirectly through another lady.

4. That she is now, and has been for several years, residing in Portsmouth in Virginia, and is ignorant of the laws of North Carolina, and was not informed of her rights in the action until recently.

5. That from dealing with S. M. Barbee, while at Chapel Hill, she has reason to believe that said Barbee at the time of his purchase knew the house and lot in Chapel Hill to be her property, and that the debt on which judgment was obtained by Benton Utley to be due and owing by Osmond Peters. That she remembers to have told Mr. Barbee, in the latter part of the year 1867, that the said house and lot in Chapel Hill was her property, free from the control or the debts of her husband in any way.

FREDENA C. H. PETERS.

Upon the hearing his Honor refused the application of the defendant and dismissed the motion.

The defendant appealed; and as ground of appeal alleged "that good cause was shown, upon application made within one year after notice of judgment, and within five years after its rendition, and that the defendant should have been allowed to defend."

J. W. Graham, for appellant.
Busbee & Busbee, contra.

READE, J. If we felt at liberty to decide the case, (527) we would probably have to take the facts in the case to be as stated by the defendant in her affidavit; and so taking them, the merits would seem to be in her favor. But, as we said in *Clegg v. Soapstone Co.,* 66 N. C., 391, and numerous other cases since, the facts must be found below. To this end the cause will be remanded. Neither party will recover costs in this Court.

PER CURIAM. Remanded.

Cited: Bacon v. Johnson, 110 N. C., 119; *Rhodes v. Rhodes,* 125 N. C., 192.

NANCY FOLK, trustee of S. A. BURNETT, v. THOMAS S. HOWARD.

Where a summons was issued within ten days before the term of the Superior Court to which it was returnable: *Held*, that the action should have been dismissed on the motion of the defendant, and that it was error to order an *alias* returnable to the next ensuing term.

ACTION, tried before *Seymour, J.*, at Fall Term, 1874, CRAVEN, for the claim and delivery of personal property. It was admitted that the summons was issued on the Saturday next before the Fall Term, 1874, of Craven.

The defendant moved to dismiss the action on the ground that the summons was void. The Court overruled the motion, and ordered an *alias* to issue, returnable to Spring Term. From which judgment the defendant appealed.

All the other facts necessary to an understanding of the case are set out in the opinion of the Court.

Green, for appellant.
Clark and *Roberts, contra.*

(528) SETTLE, J. A summons in an action for claim and delivery of personal property was issued on Saturday next before the Fall Term, 1874, of Craven, which commenced on Monday.

After the issuing of the summons, the plaintiff made an affidavit and filed an undertaking as prescribed by law; and thereupon the Sheriff was ordered to take, and did take, the property claimed into his possession, and afterwards delivered it to the plaintiff.

The Sheriff returned, however, that the summons came too late to hand to execute the same ten days prior to the Fall Term of Court.

The defendant moved to dismiss the action, on the ground that the summons was void. The Court denied the motion, and ordered an *alias* to issue, and the defendant appealed. Bat. Rev., ch. 10, sec. 2, which is the Act of 1870-'71, ch. 42, enacts that the summons shall command the Sheriff to summon the defendant to appear at the *next ensuing term* of the

Superior Court, and answer the complaint of the plaintiff, and shall be dated on the day of its issue. The officer to whom the summons is addressed shall note on it the day of its delivery to him, and shall execute it at least *ten days* before the beginning of the term to which it shall be returnable.

There is no authority given in this act, as there was in the Revised Code, ch. 31, sec. 50, to make the summons, when taken out within the time specified, returnable to the second term next after process issued. And even if there had been, the summons in this case does not profess to follow it. But under neither enactment can we find any warrant for the course which was pursued in this case.

The matter is regulated entirely by statute, and if the law now in force works inconveniently, this is not the tribunal to correct it. The motion of the defendant should have been granted.

PER CURIAM. Judgment reversed.

Cited: Manix v. Howard, 82 N. C., 125; *Henderson v. Graham,* 84 N. C., 499.

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(529)

SARAH V. YOUNG v. GEORGE L. PHIFER.

An answer in an action for specific performance, or to correct an alleged mistake in a deed which avers that "the defendant has conveyed all the land he agreed to convey," raises an important issue, and is not "sham pleading."

ACTION to compel the defendant to correct a mistake in a deed, tried at Spring Term, 1874, of CABARRUS, before *Logan, J.*

All the facts necessary to present the points decided in this Court are stated in the opinion of the Chief Justice.

On the trial below, the plaintiff moved for judgment against the defendant for the facts stated in the opinion, which motion being refused, the plaintiff appealed.

Wilson & Son, for appellant.
Montgomery, contra.

PEARSON, C. J. The motion for judgment upon complaint and answer was put on the ground that the answer was "sham pleading" to gain time. The answer can, in no sense of the word, be called "sham." It avers "the defendant has conveyed all the land that he agreed to convey." This directly makes an issue as to the right of the plaintiff to a specific performance. But the allegation of a mistake in respect to the number of acres is not controverted, and is taken to be true. Upon this state of facts the defendant relies upon the statute of limitations, and thus forces the plaintiff to rely upon C. C. P., secs. 34-90, "within three years" by way of replication. So, instead of "sham pleading," the answer makes an important question, and a very interesting one, involving the construction of C. C. P. in respect to a provision which is unusual in the legislation in this State.

The subsection (9) is in these words: "Action for relief on the ground of fraud in cases which heretofore were solely cognizable by courts of equity. The cause of action in (530) such cases *not to be deemed to have accrued* until the *discovery* by the *aggrieved party* of the facts constituting fraud."

The point made is this: Does the refusal of a party to correct a mutual mistake constitute fraud within the meaning of this subsection, or is it necessary to charge that the defendant procured the surveyor to make a false estimate of the number of acres, or that the defendant at the time when he received payment of the purchase money had knowledge of the fact that the tract conveyed did not contain the number of acres upon the basis of which the payment was made, which fraud the plaintiff did not discover?

His Honor, upon the motion, was not called upon to decide this question; but it is clear he could not treat the answer which raised it as "sham pleading"—and it may suggest to the plaintiff's attorney the necessity for amending the complaint, if he can do so consistently with the facts; if not, he must meet the question upon the ground that one who refuses to correct a mutual mistake after the expiration of three years is guilty of fraud within the meaning of this subsection. No error.

PER CURIAM. Judgment affirmed.

MARTIN V. HORNE v. MARY E. HORNE.

In a petition for divorce *a vinculo matrimonii* by the husband, on account of adultery committed by the wife, where the jury found that both parties had been guilty of adultery, and where no condonation on the part of the wife was proven: *Held*, that the Judge below committed no error in dismissing the petition at the cost of the petitioner.

DIVORCE *a vinculo matrimonii*, tried before *Buxton, J.*, at Fall Term, 1874, of ANSON.

The parties married 9 March, 1864. The application for divorce is made by the plaintiff because of alleged acts of adultery committed by the defendant. (531)

The suit was commenced by summons 9 September, 1873. The defendant makes defense, denies the imputed criminal acts, and in bar of the plaintiff's suit charges him with the commission of adultery. The cause was put to the jury upon certain issues submitted by the counsel, under the direction of the Court, which issues, with the response made thereto by the jury, are entered on record.

The jury having found both of the parties guilty of adultery, the Court thereupon dismissed the case at the cost of the plaintiff.

To this judgment of the Court the plaintiff excepted, and insisted that upon the verdict rendered he was entitled to the relief prayed for, viz., a divorce from the bonds of matrimony, because sec. 10, ch. 39, Rev. Code, making the criminality of the plaintiff in suit for divorce "a good defense and a perpetual bar against the said suit," was no longer the law of the land, as that provision was omitted in the act relating to proceedings in divorce, ratified 27 March, 1869, Acts of 1868-'69, ch. 83, subchapter 4, and had not been incorporated in Battle's Revisal, ch. 37, relating to divorce and alimony.

The defendant resisted this view of the case on the ground that inasmuch as the Act of 27 March, 1869, sec. 45, recognized ch. 39 of the Revised Code, and repealed secs. 5, 6, 7 and 8 of ch. 39, Rev. Code, leaving section 10 intact, that sec. 10 was still law, even if it was not incorporated in Battle's Revisal. It was also insisted that as this suit was commenced 9 September, 1873, which was prior to the adoption

of Battle's Revisal, the rights of the parties must be determined in this suit under the law as it then existed.

His Honor refused to give judgment in favor of the plaintiff.

During the trial there were certain exceptions, by both plaintiff and the defendant, to the evidence offered and
(532) also to the charge of his Honor, which, not being pertinent to the decision in this Court, need not be stated.

The jury having found that both plaintiff and defendant were guilty of adultery, his Honor dismissed the action, and the plaintiff appealed.

Battle & Son, for appellant.
Steele & Walker, Busbee & Busbee, contra.

PEARSON, C. J. "Recrimination and condonation" are principles of the common law in reference to applications for divorce, so the provision of the statute, Revised Code, ch. 39, sec. 10, is merely in affirmance of the common law, and it can make no difference to the plaintiff whether this section be retained or omitted by the Act of 1871-'72, ch. 193, sec. 35. Indeed, it would be more favorable to him to consider the section as retained, for the wording of that section is more narrow than the principle of the common law.

Upon this narrow wording his Honor fell into error in ruling "that while condonation was allowed to defeat an application for a divorce, the law did not allow condonation to be used in aid of an application for divorce." Such is not the common law, although it seems to conform to the wording of the statute, and the plaintiff would have a right to complain of this ruling, provided he had offered any evidence tending to show condonation of the matter proved by way of recrimination. But he offered no evidence and made no allegation to that effect; on the contrary, the evidence was by way of "recrimination," that in 1864 or 1865 he, night after night, frequented the house of a well-known prostitute, so as to force his wife in a burst of indignation to go at night a distance of more than a mile and drive him from the embrace of this prostitute. So much as matter of "recrimination": what evidence is there of condonation? None at all. Did his poor wife forgive him? So far from it, after grumbling and remon-

strating because of his evil practices, she is forced to leave him and go back to her mother's house, and he (533) goes out West.

Thus abandoned, she (led into temptation by his example) falls into the like evil practices, and he now makes that a ground for a divorce, and asks the Court to give him license to marry another wife, to be treated in the same way, and reduced to the same state of desperation.

There is, in the nature of things, a difference between adultery committed by a husband and adultery committed by his wife—the difference being in favor of the husband. There is likewise a difference between condonation by a husband and condonation by a wife—the difference being in favor of the wife. A husband who admits his wife to conjugal embraces, after he knows that she has committed adultery, is looked on as a disgraced man—"a cuckold, a beast with horns." A wife who admits her husband to conjugal embraces, after she knows that he has committed adultery, is pitied, rather than blamed, and is supposed to yield to circumstances which are beyond her control, where she has no separate estate, and because of her dependent condition, submits to this personal indignity, and tries, in patience, to do the best in her power to hide her shame, with the hope of reclaiming her husband. In our case the wife, so far from condonation, after standing the conduct of her husband as long as she could, refused longer to "hide her shame," and with strong hand drove her husband from the bed of his mistress, soon afterwards left him and went back to her mother; so condonation is out of the question, and we can only regret that afterwards she committed the same sin.

Our conclusion is, that both husband and wife are two miserable wretches, and the case is too disgusting to be longer entertained by the Court.

PER CURIAM. Judgment affirmed.

Cited: Horne v. Horne, 75 N. C., 101-2; *Steel v. Steel,* 104 N. C., 638; *House v. House,* 131 N. C., 142.

(534)

MARTIN V. HORNE v. MARY E. HORNE.

Where, upon a trial in the Court below, the plaintiff asked for a new trial, and upon its being refused, appealed to this Court, and at the same time the defendant appealed; and in this Court the judgment of the Court below was affirmed, dismissing the plaintiff's action; in such case the appeal of the defendant to this Court will be dismissed with costs.

THIS was an appeal by the defendant in the preceding case, in which all the facts are sufficiently stated.

Battle & Son, for appellant.
Steele & Walker, Busbee & Busbee, contra.

PEARSON, C. J. The appeal must be dismissed at the cost of the defendant. The plaintiff asked for a new trial for error, which being refused, he appealed.

It is set out in the record: "The defendant having stated the above points of exception, asked that the same may be placed upon record, that the ruling of the Court thereon might be reviewed, should it become necessary, in the Supreme Court, and for that purpose prayed an appeal." For what purpose does the defendant appeal? If for the purpose of having a new trial, as she and the plaintiff both asked for a new trial, the inclination of this Court at the first was to allow a new trial, and thus satisfy both sides.

But, after consideration, we have concluded to dispose of the appeal for the plaintiff, and let the counsel for the defendant know that an appeal on her part was idle and mere nonsense, for if this Court affirms the judgment in the Court below, and refuses a new trial, that is the end of it. If this Court reverses the judgment of the Court below and grants a new trial, all of the exceptions of the defendant will come on for consideration upon the second trial.

(535) This Court is not at liberty to express any opinion in regard to the exceptions of the defendant. So the appeal has no effect except to charge the defendant with the cost of the appeal.

PER CURIAM. Appeal dismissed.

D. H. and J. S. BARLOW, exrs., etc., v. BENJAMIN NORFLEET, admr., etc.

1. A proposed witness whose interest in the event of the suit is such as substantially makes him a plaintiff, is incompetent to testify as to a conversation between a testator from whom he derives his interest, and the intestate of the defendants.

2. A Probate Judge who is personally interested in the commissions to be allowed to executors is excluded from jurisdiction in such cases. And there can be no waiver of the disqualification, unless by parties having an opposing interest in some action in which the allowance of commissions arises before him.

3. Where an administration is closed, the commissions due the executors are owing, and if the amount thereof be ascertained before an action is brought, such commissions may be pleaded as a counter-claim.

4. A Judge has no right to leave it to the jury to give the plaintiff interest or not, as they should think proper. He should have instructed them that if they found that the defendant owed the principal money demanded, the plaintiff was entitled to interest from the time it was due.

(*Halyburton v. Dobson*, 65 N. C., 88, cited and approved).

ACTION to recover the value of a slave named Barbara, tried before *Moore, J.*, at July Term, 1874, of EDGECOMBE.

The following are the material facts presented by the record:

The slave, Barbara, was sold in September, 1862, by David Barlow, the plaintiffs' testator, to one William Norfleet, the intestate of the defendant. Barbara had been bequeathed to said Barlow, the testator, by H. S. Lloyd, in trust for the use and benefit of Joseph W. Lloyd during his life, (536) with remainder to his children, in case he should leave any surviving, and if not, then to the said H. S. Lloyd's sister and other brother.

Joseph W. Lloyd was offered as a witness by the plaintiffs to prove the terms of the sale as agreed by the testator of the plaintiffs and the defendant's intestate. He stated that he and Barlow, the said testator, went together to the house of William Norfleet, the intestate of defendant, in September, 1862; that the understanding between him (the witness) and Barlow was that he (Lloyd) should convey to Barlow another slave, to be substituted in the trust fund for Barbara, in case

he (Barlow) should sell the latter to Norfleet; and that he went with Barlow to Norfleet's to carry out his part of this arrangement.

The defendant's counsel objected to so much of the testimony as related to any conversation between said Barlow and Norfleet, on the ground that the witness had an interest which might be affected by the result of this action, and that he was substantially a party to the transaction. The objection was sustained by the Court, and plaintiffs excepted.

This witness further stated that the intestate of defendant took into his possession Barbara, and that she remained with him until her emancipation in 1865; that she was a very likely girl, and in his opinion worth $1,000 in good money. John Norfleet, one of the defendant's witnesses, testified that Barbara, in September, 1862, was worth about $300 or $400 in gold.

As to the counter-claim insisted on by the defendant's answer, it was in evidence that the legatees of H. S. Lloyd, in their petition to the County Court for a partition of the slaves bequeathed to them, stated as follows: "The debts of the said testator have not been discharged, there being a large amount outstanding; but there is enough owing the executors to pay the same, if it can be collected; but owing to the pending revolution, it is quite uncertain whether the amount due the said executors, or any part thereof, can ever be realized.

(537) And the slaves belonging to your petitioner under the said will have been delivered to them, upon the express condition that should the remaining assets in the hands of the said executors prove insufficient to pay the debts of said testator and the reasonable compensation of said executors for their services, your petitioners are to account to said executors for such deficit, each paying," etc. That the said William Norfleet, the intestate of defendant, and one Whitmel P. Lloyd, were the executors of the will of said H. P. Lloyd, the said Whitmel being also a legatee; that the slaves were divided, and Barbara was allotted to said David Barlow, the testator of the plaintiffs, as trustee, etc.

For the defendant, John Norfleet was called, and stated that he administered the estate of H. S. Lloyd, as the agent of the executors, and that all the moneys were received and paid out by him. That the amount received was $92,246.70, and

the amount disbursed in payment of debts and legacies was $88,594.97; and that allowing commissions at the rate of 5 per cent. on the receipts and 2½ per cent. on the disbursements in payment of debts, would amount to the further sum of $6,657.83, making the amount of credits $95,252.80, and the deficit $3,006.10; that he was to have one-half of said commissions for his services as agent. That H. S. Lloyd left a large landed estate, which has been divided among his devisees, who are the same persons as the legatees of the slaves. The witness further testified that William Norfleet and Whitmel P. Lloyd, the said executors, are both dead, and that the former, Norfleet, survived the latter; and that the last item on their account as executors, and in the account of the said William Norfleet as surviving executor of said H. S. Lloyd, was of a date prior to the issuing the summons in this action. That he subsequently to the issuing the summons, at the instance and upon the application of the defendant, as administrator of William Norfleet, audited the final account of the administration of said H. S. Lloyd's estate, and allowed commissions to him as such administrator, at the rate of 5 per cent. on the receipts and 2½ per cent. on the disbursements in payment of debts, amounting to $6,657.83, (538) as before stated. It appeared that the witness, the said John Norfleet, at the time of auditing said account, was Judge of Probate of the county of Edgecombe; and also a brother of the said William Norfleet.

The plaintiffs objected to the admissibility of this counterclaim.

The Court submitted to the jury the following issues:

1. Did the defendant's intestate purchase Barbara, in September, 1862? To this the jury responded: "He did."

2. If so, what was her value at the time of such purchase? Answer by the jury: "$550, with interest."

3. Was there a deficiency of assets for the payment of the debts of H. S. Lloyd and the expenses of administering his estate? If so, what was the amount of the deficiency? Answer by the jury: "There was a deficiency to the amount of $3,006.10, on 5 March, 1871."

The Court instructed the jury that they might or might not, in their discretion, allow interest on the value of Barbara from the time of the sale. To this the plaintiffs, insisting that

the amount bore interest, excepted. They also excepted to the allowance of the counter-claim:

1. Because the allowance of commissions was made by John Norfleet, Judge of Probate, he being interested in the matter to the extent of one-half of the commissions allowed to the executors, and was therefore disqualified.

2. Because said John Norfleet was the brother of the said William, one of the executors.

3. Because all of said commissions do not belong to William Norfleet, the surviving executor, but only one-half; the allowance being made to the executors jointly, and not of a certain amount to each one separately.

4. Because said final account was *ex-parte* and said allowance not conclusive.

5. Because the allowance was made since the commencement of this action, and no cause of action had accrued (539) on the same when this action was brought.

His Honor gave judgment on the special verdict, allowing the counter-claim set up by the defendant; from which judgment the plaintiffs appealed.

Perry, for appellants.

No counsel *contra* in this Court.

RODMAN, J. 1. Was Joseph W. Lloyd a competent witness to prove a conversation that took place between the testator of the plaintiff and the intestate of the defendant? It is settled by the case of *Halyburton v. Dobson,* 65 N. C., 88, that he is not. The testator of the plaintiff was a trustee of the slave in question for the witness, for his life, and the plaintiff would be a trustee in like manner of the sum recovered. The proposed witness was substantially a plaintiff in the action.

2. Was the judgment of the Probate Judge, passing on the accounts of the executors of Henry S. Lloyd and allowing commissions on them, admissible in the evidence to show that the executors were entitled to that amount of commissions, and that the personal estate, except the slave, had been exhausted in the payment of debts, etc.?

The Probate Judge was personally interested in the commissions. He is excluded from jurisdiction in such case by

C. C. P., Bat. Rev., ch. 90, sec. 3. It is true that in the subsection immediately following it is said that unless he is objected to by reason of his interest, at the first hearing of the matter before him, the disqualification is waived. But this implies that the judgment is given in some action regularly before him, to which there are parties having an opposite interest in the matter and capable of taking objection. It does not appear that there has ever been any action or special proceeding between the legatees and the former executors of Henry S. Lloyd, or those who now represent such executors, for the settlement of his estate, in which it would be necessary to fix the amount of commissions to be allowed to the executors. In the case of such an action pending, if (540) the legatees (being competent to act) do not object to the jurisdiction of the Probate Judge to fix the commissions in which he is interested, the allowance may fairly be considered as made by consent, and therefore binding on the parties. It did not require a statute to disqualify a Judge from sitting on his own cause. A revered maxim of the common law forbids it.

The question as to the effect of a judgment made by a Judge who had an interest was considered in the case of *Dennis v. Canal Co.*, 16 E. L. & E., 62, and it was held that such a judgment was not void, but voidable, and that it must be avoided either by the Court that rendered it or upon appeal or other suitable proceeding in a Superior Court. But that must be understood to apply to proceedings *inter partes*. An *ex-parte* judgment, as the allowance of commissions in this case was, must be liable to be attacked collaterally.

3. As it does not appear that the Judge of the Superior Court on the trial (trial of the present action) was requested to, or undertook himself, to adjudge on the amount of the commissions to be allowed to the executors, no question arises as to his right to do so. We express no opinion on that point.

4. The administration of the estate of Lloyd was closed before the commencement of this action. Whatever the executors or their representatives should receive for commissions was then owing and, though not then reduced to a certainty by a judgment, was capable of being so ascertained; and if it was so ascertained by the time of the trial, we conceive there

could be no objection to the counter-claim, on the ground that it did not exist at the commencement of the action.

5. The Judge left it to the jury to give the plaintiff interest or not, as they should think proper. We think he should have instructed them that if they found that defendant owed the principal money demanded, the plaintiff was entitled to interest from the time it became due. The Rev. Code, ch. 31, sec. 90, which we have not found in Battle's Revisal, says that all sums of money due by contract, except, (541) etc., shall bear interest. Of course, there are necessary exceptions to this rule other than those stated in the act itself: as if the contract be that the principal shall not bear interest. But so far as appears, there is nothing in the case to take the debt to the plaintiff out of the general rule. The hardship of the case from the subsequent loss of the slave is manifestly insufficient for that purpose. There is error in the matter mentioned.

PER CURIAM. *Venire de novo.*

Cited: Barnes v. Lewis, 73 N. C., 139; *Jolly v. Bryan,* 86 N. C., 462; *White v. Connelly,* 105 N. C., 69; *Wilson v. Featherston,* 122 N. C., 749.

JOSEPH A. BITTING v. SAMUEL A. THAXTON.

1. Under the C. C. P. there is but one form of civil action, and the defendant may set up as a counter-claim any claim arising out of the transaction set out in the complaint in favor of the defendant and against the plaintiff, whether the action arises out of a tort or a contract.

2. A copy of an account taken from a merchant's books is only a declaration of the merchant, and is inadmissible in evidence for the purpose of showing that it converted a quantity of B's tobacco to his own use by selling it to the merchant, and having it credited to his individual account.

3. It is competent to show that "at the regular time defendant deposited the tobacco with A, he believed A to be solvent," in order to prove that the defendant acted in good faith.

(*Walsh v. Hall*, 66 N. C., 233, cited and approved).

ACTION, tried before his Honor, *Judge Wilson*, and a jury, at Fall Term, 1874, of DAVIE, for tort against the defendant as agent of plaintiff.

It was in evidence on the part of the plaintiff that they were, in 1870, 1871, and 1872, manufacturers of tobacco in the city of Augusta, Georgia, and that the (542) defendant sought employment from them as a traveling salesman during the latter part of October, 1870, and that about 30 October, 1870, the plaintiff employed him as such salesman, on the following terms, to-wit:

That he was to travel for the house and sell tobacco by sample and report sales to the house, and it was stated that defendant was employed by plaintiffs to avoid their tobacco being sold through commission houses, and to save that expense; but there was no testimony that instructions to that effect were given defendant. That defendant was to receive his expenses and five dollars per day while traveling and selling for plaintiffs.

It was also in evidence that under this agreement the defendant proceeded to Savannah about 30 October, 1870, and on reaching that place found six boxes of tobacco at Solomon & Co.'s, and that this, with thirty-one other boxes of tobacco, twenty boxes parcel of said thirty-one having been sent by plaintiffs to Fredenburg & Co., and not accepted as coming up to sample, was placed by defendant with one C. A. Reid,

a commission merchant of Savannah, in November and December, 1870, and March, 1871, and that this tobacco was worth in market at least $13.50.

It was further in evidence that defendant had, about the date he was employed by the plaintiffs, introduced said Reid to plaintiffs, and recommended his credit, and represented him as agent of a flourishing tobacco house of Mocksville, N. C., and that the plaintiffs at that time, in the presence of the defendant, refused to deal with Reid except upon a cash basis.

It was further in evidence that Reid was generally reported to be insolvent and unreliable, and ultimately failed, and that defendant did not inform plaintiffs of his intention to deposit with Reid or disclose to plaintiffs that he had so deposited the tobacco with Reid, until the spring of 1871.

(543) It was further in evidence that defendant received the following sums on account of sales of said tobacco, at the dates set opposite to them:

1870.	15	November, the sum of.....	$100.00
1870.	19	November, the sum of.....	75.00
1870.	18	December, the sum of.....	12.85
1870.	19	December, the sum of.....	3.75
1870.	23	December, the sum of.....	25.00
1871.	5	January, the sum of.....	215.00
1871.	1	March, the sum of.....	25.00
1871.	7	March the sum of.....	56.50
1871.	17	March, the sum of.....	100.00
1871.	19	April, the sum of.....	50.00
1871.	28	April, the sum of.....	103.00

but that he did not disclose to plaintiffs that he had ever collected a cent from Reid on account of the tobacco until March, 1872, after he had been discharged from their employment; and that in disclosing that matter, defendant expressed great sorrow for having done so, and said that his necessities alone compelled him to do it.

Plaintiffs also offered in evidence the deposition of said Reid, to which was annexed as referred to therein a copy of an account between defendant and Reid touching the thirty-seven boxes of tobacco. The defendant objected to reading

said copy of the account, but admitted the delivery of the tobacco as therein stated, but denied that the heading of said account, to-wit, "Samuel A. Thaxton, in account with C. A. Reid," was true—and objected to the evidence as not competent to show the entries on the books of Reid. The objection was sustained by the Court, to which plaintiff excepted.

1. It was further in evidence that after 18 February, 1872, when the plaintiffs testified defendant was discharged, and before 1 April, 1872, the day defendant testified he quit plaintiffs' service, he went to Savannah and there collected six hundred and ninety-four dollars from divers debtors of plaintiffs, without the knowledge or consent of plaintiffs; and that plaintiffs made repeated efforts to induce defend- (544) ant to account for and pay over to them the losses they had sustained by him; but on one pretense or another the defendant failed to do so.

The defendant was then examined on his own behalf, and denied the statements of plaintiffs' witnesses as to the terms of the contract and time when he quit plaintiffs' service. Also stated that he acted with the best intentions, etc. The defendant then testified that the value of his services exceeded the amount of money received by him; that his wages exceeded the amount of receipts as agent ($810) eight hundred and ten dollars. This witness was asked as to the solvency of C. A. Reid, at the time he deposited with him the thirty-seven boxes of tobacco. Plaintiff objected to the evidence, contending that the witness should be confined to his general reputation. The objection was overruled by the Court, and the witness then stated that at the time of said deposit of tobacco he believed that he was solvent; he also denied that plaintiff gave him instructions not to deal with Reid, and denied that Bitting, in his presence, refused credit to said Reid. On the cross-examination of the plaintiff, defendant proved and put in evidence fifty or more letters, written by the plaintiffs, and addressed to defendant at various points in the South whilst in their service. On the examination of the defendant, his counsel asked what places he visited in certain months; to refresh his memory, said letters, then in the hands of counsel, were exhibited to him; he then stated he had received them shortly after their date, at the places to which they were addressed, and his counsel

then proceeded to read some of the letters to the jury. Plaintiffs objected to this method of presenting the evidence, as being suggestive to the witness of the answers he was to make, and as tending unduly to prop the witness' testimony before the jury; but the Court allowed the defendant to proceed in that manner, and he read some of them on the ground that said letters were in evidence, and contained statements pertinent to the issues in the case, and that the de-
(545) fendant had the right to read them to the jury at some stage of the trial; the others were read after defendant's examination.

The defendant offered in evidence the depositions of W. J. Blair and A. J. Smith, but stated to the Court that certain interrogatories and answers thereto, to-wit, No. ....., in Blair's deposition, and No. ...., in Smith's, were irrelevant, and proposed to omit them. This was objected to by plaintiff, and the Court stated that if plaintiff insisted on reading the whole depositions, they shall be read, but that if the defendant desired to introduce similar evidence, plaintiff could not object to it. Plaintiff insisted, and the depositions were read. Thereupon defendant introduced one Peebles, who testified that the services of a traveling tobacco salesman, performing such services as defendant contracted with plaintiffs to perform, was worth from $125 to $175 per month and expenses paid. Plaintiff objected to this testimony on the ground that both parties alleged and proved that defendant was to serve plaintiffs at a stipulated price; objection overruled on the ground that plaintiffs had insisted on reading similar evidence in the depositions of Blair and Smith. Plaintiff then introduced A. M. Boone and R. M. Payne, who testified that such services were worth $100 per month and expenses. There was testimony tending to show that the plaintiff ratified the act of the defendant in placing the thirty-seven boxes of tobacco with C. A. Reid, and looked to the latter for pay therefor.

Defendant testified that he continued in plaintiffs' employment until the first day of April, 1872. Defendant further testified that he had informed Bitting shortly after depositing the tobacco with Reid of the fact, and that he sent to Bitting by express the first $100 collected from Reid.

The plaintiffs requested the Court to instruct the jury that as this was an action of tort, a counter-claim founded in contract, such as that set up by defendant, could not be allowed, and must be disregarded by them; and if this be declined, that the counter-claim could not be allowed, for the reason that the defendant had shown in evidence that he had gone into insolvency—had surrendered the counter-claim in his schedule filed therein—and that a trus- (546) tee had been appointed thereunder, to whom the counter-claim had been assigned; which the Court declined to give, and plaintiff excepted.

In reference to defendant's insolvency, his counsel stated that he was authorized to make the trustee a party to this action, and defend the same for him; that the recovery would only ascertain the balance between plaintiffs and defendant, and if in defendant's favor, it would only go to his trustee. The defendant requested the Court to give the following written instructions, which were substantially given, and plaintiffs excepted:

1. That an agent has a right to be reimbursed all his advances, expenses, and disbursements made in the course of his agency on account of and for the benefit of his principal and which grew out of the employment and are incident to it.

2. An agent is not generally liable unless he transcends his agency, or departs from its provisions, or conceals his character, as agent, or expressly pledges his own liability.

3. That a principal discharges his agent from responsibility for deviations from his instructions, when he accepts the benefit of his act, or ratifies the sale made by him, with full knowledge of all the facts and circumstances connected therewith.

4. That an agent is not an insurer of the entire solvency of any party to whom he may sell, but is bound to great care and diligence—not the utmost, but all that a reasonable man under similar circumstances would take of his own affairs.

5. That an agent has a general lien, which is the right to retain the property of another for a general balance of accounts, and to retain the property of another until some demand of his be satisfied.

The Judge instructed the jury, among other things, not excepted to:

1. That the action was in the nature of tort, for an alleged conversion of plaintiff's tobacco, by the defendant while acting as agent for the plaintiff, and for the recovery
(547) of money collected by the defendant without authority.

2. That whether the plaintiff could recover of the defendant would depend upon the fact whether the defendant, in depositing the thirty-seven boxes of tobacco with C. A. Reid, acted in *good faith, and believed at the time that said Reid was solvent* and would pay for it; that if he acted *in bad faith* in that matter, the plaintiff would be entitled to recover the value of the tobacco, and defendant could not retain any part of the price thereof in satisfaction of any claim for services he might have against the plaintiff, unless the plaintiff, after a full knowledge of all the facts and circumstances connected therewith, ratified the act of his agent; that if he did ratify the same, then the plaintiff must sustain the loss incurred by the deposit of the tobacco with Reid, and if the plaintiff was indebted to the defendant for services to that amount he might retain the sum received from Reid in payment thereof. Plaintiff excepted.

That if the defendant collected money due plaintiff after 18 February, 1872, and before 1 April, 1872 (which was not denied), and if he acted in good faith therein, *believing at the time* he had authority so to do, or if in fact he continued in the service of plaintiff and was his agent until 1 April, 1872, then he might also retain thereof to satisfy his claim, if any, for services rendered the plaintiff. Plaintiff excepted.

The Court also instructed the jury that in this connection they might consider the contents of the plaintiff's letter to the defendant; that in reference to plaintiff's claim for services, as each party alleged a special contract, that the testimony offered as to the value of defendant's services was irrelevant; that the Court therefore withdraws it from the consideration of the jury, and directed them that they should take all the other testimony laid before them, on the part of the plaintiff and defendant, and say what was the contract entered into by the parties; was the contract
(548) that the defendant was to receive from the plaintiff $5 per day and expenses, as stated by the plaintiff, or was he to receive $150 per month, and expenses, when travel-

ing for plaintiff, as stated by defendant? That it was their duty to ascertain what was due the plaintiff from the defendant, and what sum was due to the defendant from the plaintiff, and after deducting from the greater the less sum, should render their verdict in favor of the party thus found in excess of the other. Plaintiff excepted.

The jury rendered their verdict, finding all the issues in favor of the defendant, and that there was due to him from the plaintiff the sum of $810. Rule for a new trial; rule discharged. Appeal to the Supreme Court granted plaintiff.

Bailey and *Haywood,* for appellant.
J. W. Graham, contra.

READE, J. The plaintiff claims that the defendant as his agent received so much money for him, and withholds, and also converted, property belonging to the plaintiff, to the defendant's own use, which was worth so much, and for these causes the action is brought.

The defense is a counter-claim for services rendered as agent in respect to the matters complained of.

The jury adjusted the claims of the parties, and finding a balance due the defendant of so much, returned a verdict for the defendant for the balance due him.

The verdict must be sustained unless there was some error of law on the trial.

1. The first error alleged by the plaintiff is that his declaration is in tort, and that no counter-claim can be allowed.

"The distinction between actions at law and suits in equity, and the forms of all such actions heretofore existing, are abolished, and there shall be in this State, hereafter, but one form of action," etc. C. C. P., sec. 12.

"All the forms of pleading heretofore existing are abolished," etc. C. C. P., sec. 91.

A counter-claim must be "a cause of action arising (549) out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action." C. C. P., sec. 101, subdiv. 1.

If there is anything settled in our new system it is that there is but one form of action. There are torts and contracts just as there used to be; but there are not several forms

of action as there used to be, and pleadings are not suited for different forms of action as they used to be, but are all suited to one form, whether the subject of the action be a tort or a contract. And when the plaintiff files his complaint, setting forth the "transaction," whether it be a tort or a contract, the defendant may set up any claim which he has against the plaintiff, connected with the transaction set up in the complaint; and this is called a "counter-claim." And when the plaintiff states the "transaction" in his complaint he cannot by calling it one name or another—as tort or contract—cut off the defendant's counter-claim growing out of the same transaction. It is the *transaction* that is to be investigated, without regard to its form or name. *Walsh v. Hall,* 66 N. C., 233, is probably as good an illustration as could be given: A gave B a horse in payment for a tract of land. The horse got back into the possession of A, and B sued A for the horse. And A was permitted to set up as a counter-claim that B had cheated him as to the land. So here, the defendant's counter-claim is "connected with the transaction" out of which grows the plaintiff's claim, and whether the transaction be called tort or contract makes no difference.

It may be proper to say that where the plaintiff's claim is founded on a contract, then the defendant may set up any contract as a counter-claim, whether connected with the plaintiff's claim or not.

2. The plaintiff, in order to prove that the defendant had converted thirty-seven boxes of the plaintiff's tobacco to his own use, by selling them to one Reid, offered a copy of Reid's book in evidence, in which Reid had credited the defendant with the tobacco as his own, and not as agent for (550) plaintiff. And the evidence was rejected.

Reid's book was only Reid's declaration, and that was not competent evidence. And certainly the copy was not better than the original. The only view in which it could be used would have been to strengthen Reid's testimony, who was examined as a witness, by showing that he had made the same statement before, and it would be very slight for that purpose; but it was not offered with that view, but it was offered as evidence of the fact itself.

3. The defendant as a witness was examined as to the solvency of said Reid, and he answered, "that at the time of the deposit of tobacco he believed he was solvent." The plaintiff objected to this and said "that the witness should be confined to his general reputation."

There certainly could be no objection to the witness stating his belief about it. What his belief amounts to was another question. Reputation is not the only evidence of solvency or insolvency. If the object was as it seems to have been, to show that the defendant acted in good faith, it was competent for that purpose, but it left the question open as to whether he had exercised reasonable diligence in making inquiries to support his belief.

His Honor's charge upon a number of points is set out and there is a general exception on the part of the plaintiff.

We have not discovered any error.

PER CURIAM. Judgment affirmed.

Cited: Francis v. Edwards, 77 N. C., 276; *Lee v. Eure,* 93 N. C., 9; *Wilson v. Hughes,* 94 N. C., 187; *McKennon v. Morrison,* 104 N. C., 360; *Taylor v. Hodges,* 105 N. C., 349; *Smith v. Young,* 109 N. C., 226; *Branch v. Chappell,* 119 N. C., 83; *Brown v. Brown,* 121 N. C., 10; *Dyeing Co. v. Hosiery Co.,* 126 N. C., 294.

(551)

STATE on the relation of PETER LIPPARD and wife v. HENRY TROUTMAN, guardian, and others.

1. The Act of 1866-'67, ch. 18, sec. 1, relates only to debts and causes of action arising out of new matter, and transactions subsequent to 7 May, 1865, and was not intended to embrace old debts or transactions occurring before that date, out of which causes of action might arise after that date. Therefore, where in an action on a guardian bond, the plaintiff, a *feme covert*, became of full age in 1866, married in 1869, and instituted the action in 1874: *Held*, that the statute of limitations did not bar the right of action.

2. The provision of the C. C. P., allowing a *feme covert* to sue or be sued concerning her separate property, does not remove the disability of coverture so as to allow the statute of limitations to bar a *feme covert's* right of action.

3. The right of suing alone is a privilege which may be used for the advantage of a *feme covert*, but a failure to exercise this privilege cannot operate to her prejudice.

(*Johnson v. Winslow*, 63 N. C., 552; *Plott v. R. R. Company*, 65 N. C., 74; *Harris v. Harris*, 71 N. C., 174; *Shuler v. Millsaps*, 71 N. C., 297, cited and approved).

ACTION on a guardian bond, tried at Fall Term, 1874, of IREDELL, before *Mitchell, J.*

The facts as agreed by counsel are substantially as follows:

The defendant Troutman became guardian for the *feme* plaintiff in 1853, entering into bond in the sum of $500 with one Kyles and Alexander as sureties. Alexander is dead, and the defendant Stephenson is his administrator. A *nol. pros.* was entered as to Troutman and Kyles, they being notoriously insolvent, the action standing against Stephenson, the administrator, alone.

It was in evidence from a report of a commissioner that Troutman had in his house property or money of his ward, or ought to have, of greater value than the amount of his bond. The defendant Stephenson relied upon the statute of limitations in favor of sureties. The evidence

(552) was that the *feme* plaintiff became of age on 21 March, 1866; that she married the other plaintiff in 1869, and that this action was instituted in January, 1874.

The defendant's counsel asked his Honor to charge the jury that the plaintiffs were not entitled to recover in this

action, being barred by the statute in favor of sureties; and at all events, that the husband was so bound.

His Honor thought otherwise, and so charged, that neither the *feme* plaintiff nor her husband was barred from a recovery on account of the statute of limitations. To this the defendant excepted.

There was a verdict and judgment for the plaintiffs; from which the defendant appealed.

Scott & Caldwell, for appellant.
Furches, contra.

SETTLE, J. This is an action upon a guardian's bond, executed in 1853; and the defense is the statute of limitations in favor of sureties. The *feme* plaintiff became of full age on 1 March, 1866, was married in 1869, and with her husband commenced this action in 1874.

It is admitted that the statute of limitations was suspended by a series of acts, from 20 May, 1861, until 1 January, 1870. *Johnson v. Winslow,* 63 N. C., 552; *Plott v. R. R.,* 65 N. C., 74. But the defendant says the Act of 1866-'67, ch. 18, sec. 1, so explained and qualified the Act of 1866-'67, ch. 17, sec. 8, as to open the courts to plaintiff, since 1 May, 1865, and cause the statute to run and bar this action.

But it is evident that the act relied upon for this purpose relates only to debts and causes of action arising out of new matters and transactions subsequent to 1 May, 1865, and was not intended to embrace old debts or transactions occurring before that date, out of which causes of (553) action might arise after that date. It certainly was not intended to embrace an old transaction like this, where the bond was executed in 1858. While stay-laws were passed on the one hand for the benefit of debtors, the statute of limitations was suspended on the other to save the rights of creditors. The defendants' counsel cited the Court to *Harris v. Harris,* 71 N. C., 174; but that case will be found, upon examination, to support the position here taken; for in that case the statute began to run in 1858, and the full time, from 20 May, 1861, to 1 January, 1870, was eliminated from the calculation of time.

But it is further contended that as this suit was not brought within three years after 1 January, 1870, the plaintiff is still barred, and the counsel cited *Shuler v. Millsaps,* 71 N. C., 297, to show that when the action concerns the separate property of the wife, she *may* sue alone, and he therefore argues that in such cases coverture is not now a disability. The general rule is, where a married woman is a party, her husband must be joined with her. But the statute makes certain exceptions in favor of the wife, one of which is, she may sue alone when the action concerns her separate property. Bat. Rev., ch. 17, sec. 56. This seems to be a privilege given to married women which *may* be used for their advantage; but a failure to exercise it is not to operate to their prejudice. For, in addition to the general rule above stated, coverture is recognized and treated as a disability in secs. 27, 42 and 64 of Bat. Rev., ch. 17. Then as the *feme* plaintiff did not become of age until 1866, the suspension of the statute of limitations saved her rights until 1 January, 1870. But before that time, to-wit, in 1869, she went under the disability of coverture; and sec. 28 of ch. 17, Bat. Rev., enacts: "When two or more disabilities shall co-exist, or when one disability shall supervene an existing one, the period prescribed within which an action may be brought shall not begin to run until the termination of the latest disability.

(554) His Honor in the Superior Court held that the plaintiffs were not barred, and in this opinion we concur.

PER CURIAM. Judgment affirmed.

Cited: Green v. R. R., 73 N. C., 525; *Briggs v. Smith,* 83 N. C., 308; *Davis v. Perry,* 89 N. C., 422; *Campbell v. Carter,* 95 N. C., 163; *Chaney v. Powell,* 103 N. C., 161; *Wilkes v. Allen,* 131 N. C., 280.

L. G. KINYON v. R. E. BROCK, exr. of W. A. HOWELL.

1. The same strict degree of diligence which was required of a guarantee before and since the war could not be exacted of him during the war. That forbearance which would amount to *laches* now, was, from the very nature of things, unavoidable then.

2. Therefore, where in the spring of 1860 A, the testator of the defendant, executed to B a guaranty on the note of C, which note was made on 12 March, 1860, and was due on 1 September following: *Held*, that the failure of B to sue C during the war, and the subsequent insolvency of C, did not amount to *laches* sufficient to release A from his guaranty.

(*Ashford v. Robinson*, 30 N. C., 114, and *Farrow v. Respass*, 33 N. C., 174, cited and approved).

ACTION for recovery of money upon a guaranty, tried before *Wilson, J.*, at Fall Term, 1874, of DAVIE, upon the following case agreed:

"In the spring of 1860 W. A. Howell, the testator of defendant, purchased a tract of land of the plaintiff at the price of $3,500, and in part payment therefor delivered to the plaintiff a note of hand on S. L. Howell for the sum of $2,500, dated 12 March, 1860, and due on 1 September following. The plaintiff being unwilling to receive said note without other security, W. A. Howell, at the time he passed it to the plaintiff, executed and delivered to (555) him the following guaranty on a separate piece of paper:

" 'For value received, I hereby guarantee the note on S. L. Howell of $2,500, to be good and solvent. This 9 May, 1860.

'W. A. HOWELL.'

"On 11 September, 1860, S. L. Howell paid to the plaintiff the sum of $950; and in the month of December, 1860, he paid the further sum of $495. The said S. L. Howell also paid the plaintiff in January, 1864, the sum of $700, in Confederate Treasury notes, which was to be allowed as a payment, to its value, upon the said note of $2,500. No further payments had been made on said note.

"S. L. Howell was a brother of the guarantor, W. A. Howell, and lived at the time in the town of Mocksville, Davie County; W. A. Howell lived in said county, some

twelve miles from Mocksville; and the plaintiff lived at East Bend, in the county of Yadkin, a distance of about thirty-two miles from Mocksville.

"S. L. Howell was solvent on 9 May, 1860, and remained solvent until the close of the war in 1865, when, by the loss of his slaves and other losses by the result of the war, he became insolvent; in consequence of which nothing could have been made out of him. In December, 1868, S. L. Howell was declared bankrupt.

"(*a*) That after the close of the war W. A. Howell, in a conversation with his son-in-law, Dr. D. W. Kinyon, said that 'he expected to have to pay the plaintiff's debt,' as he did not 'believe that his brother, S. L. Howell, would do so.'

"(*b*) That W. A. Howell and the defendant R. E. Brock were both notified since the close of the war that they were looked to for the payment of plaintiff's debt.

"(*c*) That W. A. Howell and S. L. Howell had been engaged in the mercantile business in the town of Mocksville a few years prior to the sale of the land before mentioned; and that S. L. Howell was indebted to W. A. Howell, over and above the note transferred to the plaintiff, on 9 May, (556) 1860, in the sum of $2,500, or thereabouts, which notes W. A. Howell held, without instituting suit, until his death in 1867, and which have never been paid.

"(*d*) That plaintiff, prior to 1862, placed the note on S. L. Howell in the hands of an attorney for collection, and subsequently instructed him not to sue. (Should the Court consider this as protected as a privileged communication between counsel and client, which they are not compelled to disclose, it is not to be considered as a part of the case).

"The above paragraphs *a, b, c, d,* if in the opinion of the Court they are not competent evidence, are not to be considered in making up the decision.

"If upon the foregoing statement, or so much thereof as is competent evidence, the Court should be of opinion with the plaintiff, judgment is to be rendered in his favor for the sum of $...., with interest, etc.; otherwise, for the defendant."

His Honor being of opinion that the plaintiff by his negligence had lost the right to sue the guarantor, gave judgment

against him for costs; from which judgment the plaintiff appealed.

Furches, for appellant.
Bailey and *Brown, contra.*

SETTLE, J. The record presents this question: Was the defendant discharged from liability by the forbearance of the plaintiff to sue the maker of the note, which the defendant's testator guaranteed? We may remark in the outset that the same strict degree of diligence which was required of the guarantee, before and since the war, was not to be exacted of him during the war. In other words, forbearance which would amount to laches now was from the very nature of things unavoidable then.

With this understanding, let us examine the case at bar. The note guaranteed did not fall due until 1 September, 1860, and on the 11th of that month the plaintiff collected $950, and again in December of the same year collected $495. (557)

Of course, the guaranty implied that the plaintiff should have a reasonable time to collect the debt after it fell due. *Ashford v. Robinson,* 30 N. C., 114.

But suppose he had brought suit immediately upon the maturity of the note: he could not have had execution of his judgment, even in the County Court, before the passage of the Act of 1860-'61, ch. 16, sec. 8, which stayed all executions and required the Sheriff to return them unsatisfied. And let it be borne in mind that from that time until the close of the war the courts were practically closed against the collection of debts, by the various acts of the General Assembly passed for that purpose. Perhaps the plaintiff could have collected his debt in Confederate money. Indeed, he did receive $700 of that currency in January, 1864; but we know from the history of the times that he could not have collected his debt in good money. No such negligence has been shown as would discharge the defendant up to the close of the war, when S. L. Howell became insolvent by the loss of his slaves.

From that time forward the defendant cannot complain of the forbearance of the plaintiff, for he was not required

to do a vain thing and sue an insolvent man, and a guarantor is not discharged simply by the negligence of the other party, but he must also show that he has sustained loss by such negligence. *Ashford v. Robinson, supra; Farrow v. Respass,* 33 N. C., 174. How could it have helped the defendant for the plaintiff to have sued S. L. Howell, after his insolvency? The forbearance of the plaintiff to sue for some time after the insolvency of S. L. Howell was, in fact, an indulgence to the defendant.

Without invoking the aid of the evidence objected to, enough appears upon the record to warrant the conclusion that W. A. Howell had full notice of the indulgence extended by the plaintiff to his brother, S. L. Howell, and it does not appear that he ever endeavored to quicken the diligence of the plaintiff. We attach no importance to the fact that the plaintiff placed the note in the hands of an attorney
(558) for collection, and afterward directed him not to sue—which fact, by the way, is objected to on the ground that it was brought to light by a violation of that confidence between attorney and client which the law protects, for admitting it in its full force does not affect our conclusion. Doubtless the plaintiff was casting about in his own mind the chances of collecting his debt, and the fact that he determined to sue to-day cannot bind him to remain of the same opinion to-morrow, even in the face of stay-laws, Confederate money and other obstacles which met him at the threshold of the Temple of Justice.

The judgment of the Superior Court is reversed, and judgment may be entered here for the plaintiff for the amount agreed upon by the parties in case the Court should be of opinion with the plaintiff.

PER CURIAM. Judgment reversed, and judgment for the plaintiff.

WILSON & SHOBER v. B. F. MOORE and others.

1. It is error to dismiss a complaint because the defendants are summoned to answer the complaint of A and B alone, and the complaint is in the name of A and B and others.

2. Where the summons is to A and B in their individual capacity, and also as executors, and the complaint is against them as individuals and executors, and also as agents or trustees as well as stockholders, etc., it is error to dismiss the complaint.

3. Where a summons concludes with a demand for the relief demanded in the complaint, and the complaint shows a cause of action arising out of contract for the recovery of money only, and demands judgment for a specific sum, and for such other and further relief, etc., the complaint should not be dismissed.

MOTION to set aside a complaint, heard by *Tourgee, J.*, at Spring Term, 1874, of GUILFORD.

At the return term of the summons, and before an- (559) swer filed, the counsel for the defendants moved to set aside the complaint filed by the plaintiffs in the cause, upon the following grounds:

1. For variance between the summons and complaint, in that the summons commanded the defendant to answer the complaint of Wilson & Shober alone, while in the complaint they sue for themselves and in behalf of all others, the creditors and note-holders of the Bank of the State of North Carolina, who will come forward and contribute to the expenses of the action.

2. For a variance between the summons and complaint, in that the defendants B. F. Moore and Margaret B. Mordecai are sued in their capacity, respectively as an individual and as executrix of George W. Mordecai, while in the complaint they are sued and judgment demanded against them not only on the ground of the individual liability of the said B. F. Moore and George W. Mordecai, deceased, but also because they, the said Moore and Mordecai, had become liable to plaintiffs as agents or trustees as well as stockholders, in connection with the other defendants.

3. That the summons concluded with a demand for the relief demanded in the complaint, while the complaint itself shows a cause of action arising on contract for the recovery of money only, and demands judgment, so far as the plaintiffs

in the summons are concerned, for a specific sum, and for such other and further relief, etc.

The plaintiffs insisted that the motion should not be granted for either of the grounds relied on, but moved, in the event that either the first or second ground should be deemed sufficient to dismiss, to be allowed to amend the summons. This was refused by his Honor, who intimated that the plaintiffs might amend their complaint if they chose so to do. Plaintiffs declined to amend their complaint, whereupon it was adjudged by the Court that the complaint be dismissed.

From this judgment plaintiffs appealed.

(560) *Dillard & Moore,* for appellants.
Gatling and *Snow, contra.*

BYNUM, J. If this were an action at common law, begun by general process, the plaintiff might have declared *qui tam* or the defendant might have been declared against in his representative character. But the rule does not hold *e converso,* for if the process is to answer the plaintiff *qui tam* and the declaration is in his own name only, the variance would be fatal. The rule was that where the process was special, that is, to answer the plaintiff suing in a particular capacity or calling upon the defendant to answer in some particular capacity, the declaration must conform thereto. But where the process is to answer generally, the declaration may be particular, and if against the defendant in several characters, it does not contradict the general process, and is no variance. 1 Tidd Pr., 450.

But in those cases where there was a variance between the writ and declaration, the rule was, not to move to set aside the declaration, as was done here, and for which there seems to be no precedent, but the motion was to abate the writ. The defendant craved *oyer* of the writ, and if upon reading it the writ contained any conditions not contained in the declaration, he took advantage of the variance by plea in abatement of the writ. 3 Bl., 299; 2 Lil. Abr., 629.

But this indulgence having been abused and made an instrument of delay, the courts of common law made a rule that *oyer* should not be granted of the original writ, which rule had the effect of abolishing pleas in abatement founded

on facts which could only be ascertained by the examination of the writ itself. In consequence of this rule it was afterwards held that if the defendant demanded *oyer* of the writ, the plaintiff might proceed as if no such demand had been made. Doug., 227-8; Bro. Abr., tit. "Oyer," 692; 2 Ld. Raym., 970; 2 Wills, 97; Co. Inst., 320; Gilbert C. P., 52.

So if this was an action at common law the defendants' motion would fail: 1st, because the matter alleged does not constitute a variance; 2d, if it did it could only be used as ground of plea in abatement of the writ, and (561) not of the declaration.

But under our new Constitution and Code we have adopted substantially the practice and procedure of the courts of equity and not of the courts of common law. In equity the bill precedes the subpœna, which issues to bring the parties defendant into Court. The prayer of the bill is not "Your orator, therefore, prays that he may have such and such relief"; but it is "to the end, therefore, that the defendants may answer the interrogatories and that your orator may have the specified relief, may it please your Honor to grant a writ of subpœna requiring the defendant to appear by a certain day and answer the bill, and abide by the decree of the Court." Adams Eq., 309. The subpœna is used to designate and bring the parties into Court only; it neither specifies, as the old common-law writ frequently *did,* in what right the plaintiff claims relief, nor the right in which the defendant is sought to be charged. These matters are set forth in the bill only, and the subpœna points to the bill as containing the causes of suit which are to be answered. As, then, it is clearly not the office of the subpœna to specify the plaintiff's claim or the defendant's liability, there can be no such thing as a variance on that account; and such a motion as the present is an unheard-of proceeding in equity and would not be there tolerated.

The only difference between the practice under The Code and in the court of equity is that by The Code the summons does not *follow,* but *precedes* the complaint. "It shall command the Sheriff to summon the defendant to appear at the next ensuing term of the Superior Court to answer the complaint of the plaintiff." Bat. Rev., ch. 17, sec. 2; C. C. P., sec. 73. In both courts its only operation and office is to give

notice of an action begun, the parties to it, and where the complaint will be filed.

In our case these purposes have been answered and the defendants have had every privilege allowed by the regular course of the Court. Their objections seem captious, (562) and for the evident purpose of delay.

The whole scope and design of the new Code is to discountenance all dilatory pleas, and to afford the parties a cheap and speedy trial upon the merits of their matter in controversy. To effect this end it is the duty of all the courts to allow amendments in the liberal spirit clearly indicated in The Code. C. C. P., secs. 128 to 136. There is error.

PER CURIAM. Judgment reversed, and case remanded.

Cited: Long v. Bank, 81 N. C., 47; *Barneycastle v. Walker,* 92 N. C., 200; *Bobbitt v. Stanton,* 120 N. C., 258; *Staton v. Webb,* 137 N. C., 39.

BURWELL EAST and wife URSULA v. SAMUEL DOLIHITE.

1. Where A, without consideration, promised to devise a tract of land to B, and on the faith of that promise B conveyed a tract of land to C, and afterwards A conveyed the tract she promised to devise to B to C: *Held*, that the promise of A to devise to B was not a contract by A which a court would specifically enforce, or by force of which a court would hold her a trustee of her land subject to her life estate, for the benefit of B; and that it did not destroy her power freely to devise or otherwise convey her land; nor did it estop C from accepting the conveyance from her.

2. A person may make a binding contract to devise his lands in a particular way, and a court of equity in a proper case will enforce in effect a specific performance of the contract. And also an owner of land may convert himself into a trustee for some other person without writing by an estoppel *in pais*.

3. The damage, to support an estoppel and convert the owner into a trustee, must be something more substantial than what would technically amount to a consideration in a contract. It must be a substantial one, and of such character that the person sustaining it cannot be put back in his former condition, and cannot be adequately compensated by pecuniary damages.

(*Saunderson v. Ballance*, 55 N. C., 322; *Mason v. Williams*, 66 N. C., 564, cited and approved).

EAST *v.* DOLIHITE.

ACTION, tried before *Cloud, J.*, at Spring Term, 1874, of STOKES.

Upon the trial below, the jury having responded (563) to certain issues submitted to them, his Honor gave judgment for the defendant. From this judgment plaintiffs appealed.

All the facts necessary to an understanding of the points decided are stated in the opinion of the Court.

Dillard & Gilmer and *Shipp & Bailey,* for appellants.
Scales & Scales and *Graves, contra.*

RODMAN, J. From the record the facts appear substantially these: In 1863 William Dolihite died intestate, possessed of personal property worth about $300, and seized in fee of 238 acres of land. He left a widow, Elizabeth, and five children, viz.: Samuel (the defendant), Tyree, Mary, Harden, and Ursula (the *feme* plaintiff). One Carson became his administrator, and the widow and Ursula Riddle were his sureties. He received the personal assets and absconded, leaving his sureties liable. Some short time afterwards an arrangement, which was never put in writing, was entered into between the widow and children, to the following effect:

1. Samuel was to release his interest in his father's estate, and to receive the land of Ursula Riddle at her death, by devise from her. She was an old, unmarried lady, the aunt of the children.

2. Tyree was in like manner to release and to receive the land of Mary Riddle, who was a sister of Ursula, and similarly situated.

3. Harden was to receive from his mother fifty acres of land which she held in her own right, and the four other children were each to pay him $25.

4. Mary was to receive one-half of her father's 238 acres.

5. Ursula, the plaintiff, was to receive the other half.

6. It was also agreed that the sureties to the administration bond should not be disturbed.

It does not appear that Ursula and Mary Riddle were parties to this arrangement, further than that it was

(564) known to them, and they executed wills according to it.

This arrangement was so far carried into effect that Harden received a deed for his mother's land, and the $100 agreed on. A deed to Ursula East, the plaintiff, for one-half of her father's 238 acres, was executed by all the other children except Samuel, and she took possession. It does not appear why Samuel failed to join in the deed. Mary received a deed for and took possession of the other half of that land. Samuel and Mary Riddle rented the lands of Ursula and Mary Riddle respectively, and went to live on them as tenants.

Some time after this arrangement was made and partly performed, Ursula Riddle changed her mind; she destroyed the will she had made in favor of Samuel, and made one in favor of the plaintiff Ursula. Samuel in his answer says this change was procured through the fraud of the plaintiff; but there is no evidence to that effect.

Upon this change the plaintiff became tenant of Ursula Riddle, and Samuel took possession of the half of his father's land which had before been conveyed to the plaintiff, and all the other children conveyed their estates in that land to him. After this Ursula Riddle signed a deed for her land to the plaintiffs, which she showed to plaintiff, but never delivered to her.

This state of affairs lasted for several years, when Ursula Riddle again changed her mind, and conveyed her land, by deed, to the defendant Samuel. The plaintiff charges that this change of purpose was induced by the fraud of the defendant; but there is no evidence to that effect.

Upon this state of facts the plaintiff contends that Ursula Riddle became a trustee of her lands for the plaintiff, subject to a life estate in said Ursula, and that the defendant Samuel was equitably estopped from accepting a conveyance, and prays that he be declared a trustee for her.

It would not be to the advantage of the plaintiff to contend that the original arrangement was irrevocably binding on the parties, or on them and Ursula Riddle; for that gave (565) the land in controversy to Samuel. But we cannot see any circumstance in what the plaintiff calls the second arrangement to distinguish it in this respect favorably for

the plaintiff from the first. If, by the law of North Carolina, part performance can in any case take an oral contract for the conveyance of lands out of the statute of frauds, it would seem that, as between the children, who were the parties to the first arrangement, it should do so in that case. That question is not presented, and it is unnecessary to express any opinion on it.

If we put that arrangement out of view as a binding one, we are of the opinion that the second arrangement did not amount to a contract by Ursula Riddle which a court would specifically enforce, or by force of which a court would hold her a trustee of her land, subject to her life estate, for the benefit of the plaintiff; and that it did not destroy her power freely to devise or otherwise convey her land; and that it did not estop the defendant from accepting a conveyance from her.

First, as to Ursula Riddle:

She promised the plaintiff to devise her land to the plaintiff, and the plaintiff on the faith of that promise rented the land of Ursula and also conveyed her interest in one-half of her father's land to Samuel. There was no consideration for the promise of Ursula in any advantage to her. The plaintiff paid her rent, but that was only as a compensation for the use of her land.

Neither was there any consideration for the promise in the form of a disadvantage to the plaintiff, by reason of her conveyance to Samuel, for that was intended and would be held to be on a condition to be void if Ursula Riddle failed to devise to the plaintiff as she had promised to do.

The first arrangement was evidently conditioned on the event that the two aunts, Ursula and Mary, should devise as they were expected to do, and the second arrangement (if it can properly be called an arrangement) was conditioned on the will of Ursula, and on the failure of that condition the plaintiff was remitted to her prior right. (566)

It is suggested that the plaintiff acted to her prejudice in yielding the occupation of her land for so many years to Samuel, who may have allowed them to become wasted by neglect or bad husbandry. Although this does not appear as a fact, yet it may have been so, and it may be supposed that

to *some* extent the plaintiff was or might have been damaged by acting on the promises of Ursula.

Under the circumstances, what was the effect of the promise of Ursula to devise to the plaintiffs?

No doubt a person may make a binding contract to devise his lands in a particular way, and a court of equity in a *proper case* will enforce in effect a specific performance of the contract. 1 Story Eq. Jur., secs. 781, 785, 786, 793; *Semmes v. Worthingham,* 38 Md., 298; *Moorehouse v. Colvin,* 9 E. L. and E. R., 136; *Berkley v. Newland,* 2 P. Williams, 108, 608.

In England and in those States in which the doctrine of part performance is admitted, such contracts will be enforced, even when not written, when the enforcement is necessary to prevent a fraud.

It is said that in this State we have got rid of that doctrine. Under the statute of frauds no contract for the conveyance of any interest in land is valid if not in writing, and it is said that in this State we admit of no exception.

Nevertheless, it is held that an owner of land may convert himself into a trustee for some other person, without writing, by an estoppel *in pais,* as in *Saunderson v. Ballance,* 55 N. C., 322.

The plaintiff does not seek a specific performance, or to convert Ursula Riddle into a trustee on the ground that the contract, though oral, has been in part performed. She puts her case on this proposition: that by the promises of Ursula Riddle to devise to her she was induced so to act that in the event of the non-performance of the promise she would be injured. She contends that her case comes within the principle of *Saunderson v. Ballance,* above cited; *Mason v. Williams,* 66 N. C., 564, and of other cases to the same effect.

(567)

As an objection to this we lay no stress on the absence of proof that the plaintiff was damaged by her reliance on the promise. A change of residence may of itself imply *some* damage. But the damage to support an estoppel against the owner of an estate, and convert him into a trustee, must be something more substantial than what would technically amount to a consideration in a contract.

It must be a substantial one, and of such a character that the person sustaining it cannot be put back in his former condition and cannot be adequately compensated by pecuniary damages. The strongest objection, however, to the view of the plaintiff arises out of the nature of the promise.

I will not venture to say that a promise to be performed in the future can in no case, and under no circumstances, be the foundation of an estoppel. But certainly, in general, the foundation of such estoppels as we are considering is the fraudulent misrepresentation or concealment of a fact.

They are founded on the fraud, actual or in contemplation of law, of the party who is held bound. But in this case there was no fraud on the part of Ursula Riddle. It cannot be said that the failure to perform a promise is necessarily a fraud. Still less can that be said of a promise to make a will in a certain way. Such a promise (except under special circumstances, which, as has been seen, would require a court to enforce its specific performance) carries with it, as a will itself does, the idea and condition of revocability. It expresses a present intent, and is understood to be contingent on the continuance of the intent. I conceive there is no case where such a promise has been considered as the foundation of an estoppel.

There are in our books of Reports several cases of actions brought to recover for services rendered to a person since deceased, upon the faith of expectations held out or promises made by him to compensate the plaintiff by his will, which he failed to do. In such cases it has been held that the plaintiff could not recover, because the circumstances negatived an implied promise to pay. But the idea is not (568) anywhere suggested that an estoppel *in pais* had been created under which they could claim as *cestui que trust* of the estate. The doctrine contended for would be dangerous. It would practically convert mere words, without writing, without witnesses chosen to attest, or any solemnity, such as the law prescribes for wills, into an irrevocable will in the shape of a trust.

Second. Was the defendant Samuel estopped to accept the land?

He has the legal title, and we can see nothing in the case to make it against equity and good conscience for him to keep it.

He says in his answer that he "quietly submitted" to the change in the will of Ursula Riddle by which the plaintiff was substituted for him as devisee, and this, with the fact that after that change he took a deed for the half of his father's land which had previously been conveyed to the plaintiff, and possessed it for several years, is urged as creating an estoppel against him.

It cannot be seriously contended that because a person named as legatee in the will of a living person "quietly submits" to a change in the will made by the living testator, and act as if he had abandoned all expectations under the will, he becomes estopped from ever accepting a legacy from the testator, in case he should again alter his will and give him one.

As the deed to the defendant for the Dolihite land was evidently intended to be conditional upon the event that Ursula Riddle conveyed to the plaintiff, the defendant is a trustee of that land for the plaintiff, and must convey to her as in his answer he offers to do.

PER CURIAM. Affirmed.

Cited: Rainey v. Hines, 120 N. C., 381.

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(569)

J. J. LONG, assignee, v. W. T. STEPHENSON.

Before an action can be sustained against an endorser of a draft it must appear that the same has been presented to the drawee for acceptance or payment, and that due notice has been given to the endorser of its non-acceptance or non-payment.

(*Hubbard v. Troy,* 24 N. C., 134; *Denny v. Palmer,* 27 N. C., 623, cited and approved).

ACTION, heard before *Albertson, J.,* at Spring Term, 1874, of NORTHAMPTON.

On 28 January, 1862, one N. M. Long, Jr., gave a sight draft on Col. N. M. Long for the sum of four hundred dollars, payable to Mrs. M. W. Ransom or order. This draft was transferred to the defendant, and by him transferred to the plaintiff.

This action was brought to recover the value of the draft, with damages. The plaintiff alleged that Col. N. M. Long refused to accept or pay the draft, and that defendant on demand, before action was brought, also refused to pay.

The defendant alleged that he had no knowledge of the refusal of N. M. Long to accept or pay the draft, and that he had no notice of the non-acceptance or non-payment of the same until shortly before this action, and that he had reason to believe that the draft was never presented to N. M. Long.

That the draft had been protested and no notice given of its non-payment to the defendant.

The jury returned a verdict subject to the opinion of the Court as to whether upon the facts the plaintiff was entitled to recover. The Court gave judgment for the defendant, and thereupon the plaintiff appealed.

R. B. Peebles and *Conigland,* for appellant.

Smith & Strong, contra, submitted that the draft must be presented to drawer for payment. 2 Green. Ev., secs. 175, 176; nor is presentment excused by drawer's death, insolvency, etc. *Ib.,* sec. 177.

Notice of non-payment should be given. *Ib.,* sec. (570) 186; *Hubbard v. Troy,* 24 N. C., 134.

Insolvency does not excuse. *Denny v. Palmer,* 27 N. C., 623; *Esdoile v. Sowerby,* 11 East, 113; 2 Parson Bills and Notes, 446.

It must be in reasonable time. *Ib.,* 506, *et seq.;* 1 Parson Bills and Notes, 377, 381-2.

SETTLE, J. The authorities cited by the defendant's counsel establish beyond controversy:

1. That the draft should have been presented for payment.

2. That notice of non-payment should have been given in reasonable time to the defendant.

As both of these essential requisites to the maintenance of this action are wanting, we concur with his Honor that the plaintiff is not entitled to recover.

PER CURIAM. Judgment affirmed.

MATTHIAS HARVEY and others v. AMOS HARVEY and others.

1. Where devises of land are vague and indefinite, it is competent for the Court, by the intervention of commissioners, to render that certain which was before uncertain, and thus effectuate the intention of the testator. And there being no suggestion of fraud or misconduct on the part of such commissioners, and no evidence offered to sustain the exceptions to their report, the report should be confirmed.

2. Where a testator devised to A and B, two of his sons, each a portion of his land, and in another clause directed the residue to be sold, and the proceeds to be divided between others of his children: *Held*, that A and B may be regarded as tenants in common with those claiming the residue; and that the Court may call to its aid commissioners to make partition of the lands of the testator.

(*Stowe v. Davis*, 32 N. C., 431; *Bradshaw v. Ellis*, 22 N. C., 20, cited and approved).

SPECIAL PROCEEDING, heard upon appeal from Probate Court, before *Seymour, J.*, at chambers, Fall Term, 1870, of LENOIR.

(571) The following are the facts as found by his Honor:

1. Thomas Harvey, the deceased, died on 16 November, 1867, leaving him surviving the plaintiffs Matthias Harvey, Elizabeth Aldridge, wife of L. H. Aldridge, Catharine E. Taylor, wife of Green Taylor, and the defendants Amos Harvey, Franklin Harvey and Thomas Harvey, Jr., his only heirs at law.

That the said Thomas Harvey, Sr., was at the time of his death seized and possessed of two tracts of land which he regarded as one plantation, situated in Lenoir County, one tract containing about 705 acres, the other 68¾ acres. The smaller tract is distant from the larger about one hundred yards.

That Thomas Harvey, Sr., left a last will and testament whereby, in item 2, he devised to his son Thomas Harvey, Jr., 250 acres of land, including the buildings whereon I (the testator) now live and occupy. By item 3 he also devised to his son Franklin Harvey (under whom the defendant Needham Moore claims) 250 acres of land, including the buildings which the said Franklin now occupies; and by item 4 he devised all the residue of my (his) lands to be sold, and the proceeds equally divided between Amos Harvey, Eliza Ald-

ridge, his granddaughter Catharine E. Taylor, and also one-fourth part to Matthias Harvey's children.

At the time of making the said will, and also at the time of his death, the testator resided on the larger tract and the buildings occupied by Frank Harvey were situate on the same tract.

The undivided interest of Frank Harvey in the lands was sold by the Sheriff to satisfy executions in his hands, on 10 April, 1871, and the defendant Needham Moore became the purchaser for the sum of $1,905, and took the Sheriff's deed therefor, dated 10 April, 1871, which was probated 15 April, 1871, and registered 17 April, 1871. The defendant Moore went into possession of said interest by virtue of this deed, and has since remained in possession.

On 22 February, 1873, the plaintiffs, Matthias (572) Harvey, L. H. Aldridge and wife Eliza, Green Taylor and wife Catharine, and others, filed their petition against the defendants Amos Harvey, Franklin Harvey, Thomas Harvey, Jr., and Needham Moore, before the Clerk of the Superior Court of Lenoir County, praying for a division and partition of said land according to the interest of the parties entitled thereto under the 2d, 3d and 4th items of the will.

In pursuance of this petition, after due process served and returned, the Court appointed Wiley J. Moseley, Thomas A. Heath and W. J. Pope, commissioners to make a division and partition of the land specified in the will.

On 19 April, 1873, the said commissioners proceeded to set apart and allot the land, in obedience to the order of appointment, at which time they allotted to the defendant Thomas Harvey, Jr., 250 acres of land out of the larger tract, including the buildings occupied by Thomas Harvey, Sr., deceased, at the time of his death; to the defendant Needham Moore (claiming under Franklin), 250 acres of land, including the 68¾-acre tract and the buildings occupied by the defendant Franklin Harvey at the time of the death of the testator. Only 181¼ of the 250 acres allotted to the defendant Moore was carved out of the 705-acre tract, and the balance of said land of which the testator was seized, and which he devised to be sold under the 4th item of the will, they allotted entirely out of the 705-acre tract.

On the return of the report of the commissioners, on 28 April, 1873, the defendant Needham Moore filed the following exceptions to the confirmation of the report:

1. That said commissioners set apart to him the 68¾-acre tract, which is entirely separate and distinct from the 705-acre tract, on which the buildings of Franklin Harvey were situated at the death of the testator, and only allotted to him 181¼ acres out of the 705-acre tract.

2. That the timber and wood necessary and convenient for fencing defendant's farm is entirely cut off said farm,
(573) and in order to fence said farm he will be compelled to get his timber off of a different tract of land.

3. That said partition is not in accordance with the meaning and intention of said testator as expressed in the 3d item of said will, but, as he alleges, the testator intended to give the said Franklin Harvey 250 acres of land entirely out of the 705-acre tract, and that the 68¾-acre tract must be allotted as a portion of the residue left to be sold under the 4th item in the will.

No evidence was offered to sustain the exceptions, and the report was confirmed, whereupon the defendant Moore appealed to the Superior Court.

His Honor at the hearing affirmed the judgment of the Probate Judge, and the defendant again appealed.

Battle & Son, for appellant.
Faircloth & Grainger and *Smith & Strong, contra.*

SETTLE, J. We have had some difficulty in overcoming the objection that the devises of land to Thomas and Franklin Harvey are so vague and uncertain as to be incapable of location. No metes and bounds or other description of the land is given, save only that Thomas' tract is to include the house where the testator resided, and Franklin's is to include the house where he (Franklin) resided at the death of the testator.

Upon consideration, however, we have concluded that it was competent for the Court, by the intervention of commissioners, to render that certain which was before uncertain, and thus effectuate the intention of the testator.

We think that those who claim under the 2d and 3d items of the will may be regarded as tenants in common with those who claim under the 4th item, and that the Court may call to its aid commissioners to make partition of the lands of the testator.

Assuming, then, that the Court has power to decree (574) partition, have any grounds been shown why the report of the commissioners should not be confirmed? The only objection we hear to the confirmation of the report is that the commissioners have allotted to the share of Franklin Harvey 250 acres out of the 705-acre tract. We have the fact established that "the testator regarded his two tracts as one plantation."

The 68-acre tract lay nearer to that portion of the land upon which Franklin Harvey resided than it did to the other lands, and of course the commissioners, who viewed the premises, took into consideration all the circumstances, woodland, cleared land, rich land, poor land—in fact, everything that went to make up its value—and their report should be confirmed unless something improper appears upon its face or is shown by extrinsic proof.

There is nothing wrong appearing upon the face of the report, for this Court has repeatedly held that in a will, two tracts of land, as much as half a mile apart, cultivated by the testator as one farm will pass under the description of "my plantation." *Stowe v. Davis,* 32 N. C., 431; *Bradshaw v. Ellis,* 22 N. C., 20.

There is no suggestion of fraud or misconduct on the part of the commissioners, and the case for this Court states that no evidence was offered to sustain the exception of the defendant.

PER CURIAM. Judgment affirmed.

Cited: Jones v. Robinson, 78 N. C., 400; *Wright v. Harris,* 116 N. C., 465.

(575)

JAMES BLYTHE, executor, and ELIZA J. HOOTS, executrix, v. J. M. HOOTS and others.

1. In a petition to sell land for assets an order that B, the executor, and H the executrix, "have leave to sell seventy-five acres of the land described in the petition, so as not to include the dwelling-house and outbuildings and garden of the premises to be surveyed and set apart by the petitioners before sale," and there was no survey made to identify the seventy-five acres: *Held*, that such order was too indefinite to justify a sale, and should be vacated and the sale set aside.

2. Where an order of sale directs it to be made by the executor and executrix, and the sale is made by the executor alone, who received all the purchase money and made his report of sale, which was confirmed: *Held*, that such sale was irregular, subversive of the rights of the executrix, and ought to be set aside.

MOTION by executors, to set aside a sale of land, before the Probate Court of HENDERSON, and heard upon appeal by *Henry, J.*, at chambers, 27 June, 1874.

A special proceeding had been brought by the plaintiffs, as executor and executrix of one Joseph Hoots, before the Probate Judge, asking the sale of land for assets. The parties interested were all brought into Court, and the Probate Judge ordered the sale as prayed for. The executor, Blythe, one of the plaintiffs, sold the land, after due notice, and one S. M. King became the purchaser at $233, the purchase money being paid to Blythe. He at once paid out the same for costs and charges and for the debts of the testator, and the whole proceedings, including report of sale, etc., were confirmed by the Probate Court, there being no infant plaintiffs; and title was decreed to be made to the purchaser, King, and was made by Blythe, the executor.

The testator had devised the land sold under the petition of the plaintiffs, and before alluded to, to his wife, the plaintiff Eliza, appointing her executrix. She qualified and joined in the petition to sell the land. The land sold included a portion of the testator's homestead, not interfering with the (576) dwelling and other buildings. The testator died before the adoption of our present Constitution, leaving infant children.

The executrix, after joining in the petition to sell the land, refused to have anything further to do with the proceeding,

and claimed a homestead for herself and children. She denied having employed any counsel, and insisted that, notwithstanding she signed the petition, she did not understand its contents nor its effect. For these reasons she moved the Clerk to set aside the sale, and upon his refusing, appealed to the Judge of the District at chambers.

Upon the hearing before his Honor, he set the sale aside, whereupon the plaintiff Blythe and the purchaser, King, who had been made a party, appealed.

Other facts pertinent to the points decided are stated in the opinion of the Court.

J. H. Merrimon and *Collins,* for appellants.
No counsel *contra* in this Court.

PEARSON, C. J. We concur in the conclusion of his Honor, that "the judgment and decrees, etc., made by the Clerk be vacated and set aside."

We put our decision upon two grounds:

1. The order which authorizes the executor and the executrix to sell the land does not sufficiently describe the land which they were to sell. It is in these words: "Ordered, that James Blythe, executor, and Eliza Hoots, the executrix of Joseph Hoots, have leave to sell seventy-five acres of the land described in the petition, so as not to include the dwelling-house and outbuildings and garden of the premises, to be surveyed and set apart by the petitioners before sale."

This leaves it in doubt whether "the dwelling-house and outbuildings and garden of the premises" were to be surveyed and set apart by the petitioners before sale (with a view to the widow's dower), which is the grammatical construction, or whether the "seventy-five acres" were to be surveyed and set apart before the sale; but take it (577) either way, it nowhere appears that either the one or the other was surveyed and set apart before the sale.

So, in fact, the land offered for sale was not identified, and persons bidding at the sale could not tell what particular land was offered for sale. The petition sets out that "Joseph Hoots died seized of one hundred and twelve acres of land, including the place where he lived and died, joining Rufus Edney, Andrew Maxwell and Toliver Lewis, on the waters of Clear

Creek, worth some five or six hundred dollars, subject to the widow's claim of dower," and the order is to sell seventy-five acres of the land as above stated. The dower was not assigned, and no survey was made to identify the seventy-five acres.

James Blythe *alone* reports that he had sold *"the land ordered to be sold,"* and received the purchase money, and thereupon the Clerk confirms the sale of "seventy-five acres of the land described in the petition." Thus the land sold is left altogether indefinite, and the part of the order of sale (whether it meant to have the dwelling-house surveyed and set apart, or to have "the seventy-five acres" surveyed and set apart) was not complied with.

2. The order directs the sale to be made by Blythe, the executor, and Eliza Hoots, the executrix; the sale was in fact made by Blythe alone, who received all of the purchase money and made his report of the sale, which was confirmed; thus the rights of Eliza Hoots, the executrix, were, in the words of her petition, "subverted," and after getting her to swear to the petition to obtain leave to sell, she is put aside and excluded from any further participation in the matter; the sale is made and the purchase money received and appropriated by Blythe alone. In this there is manifest error, and the executrix was well warranted in her petition to set aside the sale.

PER CURIAM. Judgment affirmed.

Cited: Wahab v. Smith, 82 N. C., 233.

(578)

C. SOSSAMER v. ELI H. HINSON and others.

1. A justice of the peace has authority, under sec. 50, ch. 63, Bat. Rev., to issue a summons to any county in the State, and bring the defendant before his Court for trial.

2. It is not error to refuse a motion to transfer a case, brought up from a Justice's Court upon a *recordari* from the summons docket to the civil issue docket, when no error is assigned, and no merits shown or alleged.

ACTION, commenced in a Justice's Court and carried by *recordari* to the Superior Court, and tried before *Schenck, J.*, at Fall Term, 1874, CABARRUS.

At the hearing a motion was made to transfer the case from the summons docket to the civil issue docket.

The motion was overruled by the Court, and the defendant appealed. The facts necessary to an understanding of the case are stated in the opinion of the Court.

Barringer, for the appellant.
Shipp & Bailey, contra.

BYNUM, J. Whether the writ of *recordari* granted in this case is viewed as one in the nature of an appeal or of false judgment, his Honor committed no error in dismissing it. If the writ is viewed as in the nature of an appeal, no merits are shown or alleged, and the defendant has been guilty of laches. If the writ is considered as in the nature of a writ of error, or false judgment, no error in law is assigned. The only error alleged is that Gorman, a resident of Cabarrus County, though having no interest, was made a defendant, fraudulently, to give the Court jurisdiction. But the justice of the peace had jurisdiction, whether Gorman was made defendant or not. By perusing Battle's Revisal, ch. 63, sec. 50, the justice of the peace of one county can issue his summons to any other county of the State, and bring the defendant before his Court for trial.

The summons in this case was issued in conformity (579) to law, and the judgment was regular, and no legal defense is alleged.

PER CURIAM. Judgment affirmed.

Cited: Lilly v. Purcell, 78 N. C., 83.

HOWITT PROCTOR v. W. AND W. RAILROAD COMPANY.

1. Where in an action against a railroad company brought within six months, to recover damages for an injury to plaintiff's cow, it was proved that the cow jumped on the track at the opening of a cut some two hundred yards in front of the defendant's engine, which was running at the rate of twenty-three miles an hour; and it was further proved, that as soon as the cow was discovered, the engineer blew the alarm whistle and reversed the engine and the brakes were applied, and that the engine running at that rate of speed could not be stopped under four hundred yards: *Held*, that the defendant's agents were not guilty of any neglect, and that the company was not responsible for the injury resulting from the engineer's running against the cow.

2. Judgment in this Court for defendant.

ACTION, tried before *Watts, J.*, at Spring Term, 1874, NASH.

The suit was brought to recover damages for injuring a cow, and was referred to John H. Thorp, who returned the following report:

"I find as matters of fact, that on 26 March, 1872, about two and a half miles south of Rocky Mount, on the defendant's railroad, which divides at that point the counties of Nash and Edgecombe, the defendant's mail train knocked off said road a cow belonging to the plaintiff, so injuring her as to render her valueless, except as to her skin; that said cow was worth thirty dollars, and her skin after being taken off was worth two dollars. That said cow jumped across a ditch upon said railroad, within two hundred yards in front of said train while it was running at the rate of twenty-three
(580) miles an hour; that the engineer of said train, an agent of the defendant, blew the alarm whistle, that the brakes were applied and the engine reversed and the speed of the engine slacked to about twenty miles an hour, when the cow was struck. That the ground was about level where the cow was struck, the train being in a cut twelve feet deep when she came on the track, the cow being at the end of the cut. That the train had all the necessary appliances of brakes and brakemen, and could not have been stopped in less than four hundred yards, while running at that speed. That this action was brought within six months after the injury to the cow.

That the loss of plaintiff by reason of the injury to said cow was twenty-nine dollars.

"I find as matters of law: 1. That defendant was not negligent in having injured said cow.

"2. That said defendant is not liable for the injury done.

"Wherefore it is considered that the defendant go without day."

To this report the plaintiff excepted, on the ground that the facts found did not in law warrant the conclusions.

The Court sustained the exception, whereupon the defendant appealed, upon the following grounds:

1. Because his Honor erred in sustaining said exception.

2. Because the conclusions of law were warranted by the facts as found by the referee.

Moore & Gatling, for defendant.

No counsel in this Court *contra.*

SETTLE, J. This action having been commenced within six months after the injury complained of, there is a presumption of negligence against the defendant.

But the facts found by the referee more than rebut that presumption and show positively that the defendant exercised due care.

A cow jumped across a ditch upon the track of the (581) defendant's road, two hundred yards ahead of the engine, while the mail train was running at the rate of twenty-three miles an hour. From the nature of the surrounding ground, and a cut in which the train was, the engineer could not see the cow until she jumped upon the track.

The engineer blew the alarm whistle, the brakes were applied, the engine was reversed and the speed slackened to the rate of twenty miles an hour. The train was provided with brakes and brakemen and could not have been stopped in less than four hundred yards while running at that speed.

The agents of the road seem to have been both vigilant and active; the engineer was at his place, the brakemen were at theirs; and they did all in their power to prevent the accident.

What more could have been done? Nothing that we can see, unless the road had been required to fence the track.

Railroads are very properly held to a rigid accountability; but they are of great public benefit, and should not be subjected to such unreasonable restrictions as would destroy or greatly impair their usefulness.

The judgment of the Superior Court is reversed, and judgment here for the defendant.

PER CURIAM. Reversed.

Cited: Doggett v. R. R., 81 N. C., 466; *Durham v. R. R.*, 82 N. C., 354; *Winston v. R. R.*, 90 N. C., 68; *Bethea v. R. R.*, 106 N. C., 281.

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(582)

W. F. DEAL v. W. PALMER.

1. It is not error for a Judge in the Court below in an action of ejectment, to charge the jury that a "carding machine" requiring several men to move it, not fastened to the house in which it was used, was a fixture, and nothing else appearing, passed with the land.

2. Nor is it error to charge that although the plaintiff, a mortgagee, had title to a "carding machine," and he afterwards chose to buy the mortgagor's interest in the same and pay his price therefor, the sale would be a valid and a good one.

3. An unregistered mortgage, though binding as between the mortgagor and mortgagee, is not valid as to a third party purchasing the mortgaged property for a valuable consideration and without notice.

(*Gaither v. Teague*, 29 N. C., 460, cited and approved).

EJECTMENT, tried before *Henry, J.*, at Spring Term, 1874, BURKE, having been removed from Caldwell.

Among other things, the defendant alleged that the only title the plaintiff had to the land was under a deed from the Sheriff of Caldwell County, made in pursuance of an execution in his hands against the defendant, and that the sale of the Sheriff was void on account of his failure to lay off a homestead for defendant. The defendant further alleges that at the time the land was sold by the Sheriff, the plaintiff was surety for him, the defendant, for a small sum, and agreed before the sale to bid off the land, and take a deed, and hold

the land in trust for the defendant, and as soon as the plaintiff was released from said suretyship and repaid his advances, to reconvey the land to defendant's wife and children. That he had paid the debts for which the plaintiff was surety, and also the money paid for the land.

The case was submitted to the jury upon the following issues:

1. Did the plaintiff buy the defendant's land, intending to allow the defendant to redeem it by paying all money advanced by the plaintiff and the debt for which the plaintiff was his security? (583)

2. Has the defendant paid the money so advanced by the plaintiff and the debt aforesaid?

3. If not, how much is now due?

The plaintiff introduced in evidence a deed conveying to him the defendant's interest in the land in question, executed by the Sheriff of Caldwell County, in pursuance of a sale made in obedience to an execution issued from the Supreme Court of North Carolina.

The judgment and execution were admitted by the defendant. The plaintiff agreed that the first issue might be found in the affirmative.

The defendant was introduced as a witness for himself, and testified that at the time of the sale he owned a mule worth about $100. That shortly after the sale he delivered said mule to plaintiff with the understanding that he was to allow defendant $100 for said mule, and if he got more than $100 for it he was to allow defendant the excess. That the price of the mule was to be applied to the repayment of such money as plaintiff had paid, or should pay, for defendant on certain executions under which the land was sold. That plaintiff paid for defendant, on executions under which the land was sold, as follows: On a first execution, $17.46; on a second, $29; and on a third, $21. Plaintiff paid no other money for defendant. That the agreement in regard to the land was that plaintiff was to bid off the land for defendant, take the Sheriff's deed therefor, pay off the executions, and hold the land to secure the money so advanced, and also to indemnify him as security for defendant on a note for $282.40, due one P. Carlton. Shortly after the sale of the land the plaintiff took up the Carlton note, substituting his own therefor, and

brought the note to defendant and proposed to swap it to defendant for a carding-machine, situated on the land sold, and which defendant claimed. The machine was on the bank of a water-course, was run by a water-wheel, and was very heavy,
requiring several men to move it. The machine was
(584) worth $300. It was not fastened to the house in any
way, but could have been picked up and carried off. Defendant assented to plaintiff's proposition. Shortly after this the house and machine were burned.

The plaintiff testified as follows: "Before the sale I was requested by defendant to lend him the money to pay off these executions. I declined to furnish it, but in response to his repeated urging, agreed to buy his interest in the land, telling him that I made no children's trades, but that if he could repay me within a reasonable time whatever money I paid out for him, I would reconvey the land to his wife and children. I bought the land with this understanding. Just before the sale, in my brother's presence, at Lenoir, defendant, after calculating his personalty, with a view to see if it was covered by the homestead, and finding that he had $575, agreed to let me have a mule at $75, and have it credited on the note substituted by plaintiff for the defendant.

"At the time of the mule trade nothing was said about its being mortgaged to a third party, nor was I ever informed of it by the defendant. When calculating his personalty he put down his carding-machine at $200, but was informed by my brother that the machine was real estate, and would be sold with the land. Defendant stated publicly that his title was good, and that no homestead would be claimed. The sale took place 4 May, 1869. After I had sold the mule, I was informed by one J. F. Munday, agent of Harriet Mull, who showed me a written instrument, reading as follows:

" 'Six months after date, I promise to pay Harriet Mull or order, forty dollars, the price of one mule colt bought of her, the mule to stand security for the price until paid for.

'W. PALMER.'

"On this note judgment had been given by a magistrate, and that judgment stayed by an insolvent man, now a discharged bankrupt, and a second judgment given on the judg-

ment so stayed. I paid off the debt, amounting to (585) $46.85, and took up the note and judgment. Soon after, I bought the land, and I understood that in buying the land I also bought the carding-machine. I went to see defendant in regard to the management of the machine. During the time I was there, at his request I left with him the note which I had signed as security, and which I had paid off, amounting to $282.40, but did not have the note with me, or pay it to him, in consideration of any purchase of any machine, or any other property. He said he wanted it to see from it just how we stood. A few days afterwards I asked him for it. He said that the machine and house had been burned, and this note was in a box in the machine house, and had been burned. Twelve months after the sale I demanded my money, but at his request I gave him six months longer. I then demanded my money and my land, but again granted six months delay. I then demanded that within two weeks my money should be paid or my land surrendered. At the end of that time, nothing having been done, I sued the defendant. I have never received any money or property from the defendant, except the mule at $75, and have paid for him the note for $282.40, the execution of $18.20, and $46.80 on the mule."

The plaintiff and defendant both introduced witnesses to corroborate their testimony. The character of the plaintiff was proved to be good by several witnesses. Some of them saying that "it is as good as anybody's."

The character of the defendant was shown by several witnesses to be bad, for not wanting to pay his debts, and by one witness to be bad in regard to statements concerning his debts.

His Honor instructed the jury: 1. That the carding-machine was a fixture, and nothing else appearing, passed with the land to Deal.

2. That notwithstanding Deal had thus purchased it, and had title to it, if he afterwards chose to buy it again of Palmer, giving his price for it, the sale would be valid and a good one. (586)

3. That as to the mule, although as between Palmer and Harriet Mull the paper-writing was a mortgage passing title, still as between Palmer and Deal, Deal being a purchaser for valuable consideration without notice, it was void

as to Deal, and Deal's payment to Munday, Mull's agent, was a voluntary one, for which he could have no recourse on Palmer, and that he was entitled to no credit for the amount so paid.

All the issues were found in favor of the defendant. Motion for a new trial; motion overruled. Judgment, and appeal by plaintiff.

Folk and *Cilley,* for appellant.
No counsel *contra* in this Court.

PEARSON, C. J. We see no error in the instructions.

1. If the "carding-machine" was not a fixture, then clearly the dealing in regard to it was valid, and the defendant was entitled to have the price agreed on credited upon the mortgage debt.

2. If the "carding-machine" was a fixture, and constituted a part of the mortgaged premises, we can see no reason why the mortgagee was not at liberty to buy and the mortgagor to sell his interest, that is, his right to redeem, so as to give the mortgagee an *absolute* title, discharged of the right to redeem.

Why should not an agreement by which the mortgagee takes, say, one-half *absolutely* and the mortgagor takes the other half discharged from the incumbrance, be valid? This was the view taken of the case by his Honor and the jury, and we find no fault in it.

3. In respect to the payment of the judgment for the price of the mule, it was *officious.* The plaintiff could not in that way add to the incumbrance on the land, unless he was obliged to do so in order to resist the claim of Mrs. Mull, without the assent of the defendant.

(587) In *Gaither v. Teague,* 29 N. C., 460, an instrument somewhat similar in wording to the one in this case, was held, after much deliberation, not to be evidence of a sale and a mortgage to secure the price, but only of an executory agreement to sell. Here the words of the instrument admit of no question: it was the intention of the parties, and the legal effect of the instrument is to make a sale of the mule, with a mortgage to secure the price; so the instrument required registration in order to affect the title which the plain-

tiff had acquired, and he was not obliged to pay the judgment to protect himself. That the defendant did not consent to the payment by the plaintiff, so as to add to the amount of the incumbrance upon his land, is manifest from the fact that he had declined to pay the judgment, and had sold the mule to plaintiff in order to reduce his property within the limit allowed as a "personal property exemption"; of this the plaintiff had notice. So it is clear, the plaintiff had no right to add the sum paid to Mrs. Mull as an additional charge on the land, and can hold it only as her assignee, and take his chances to collect it, as she would have been able to do. We concur in the view taken of this matter by the Court and jury. No error.

PER CURIAM. Judgment affirmed.

Cited: R. R. v. Comrs., 84 N. C., 586; *Frick v. Hilliard,* 95 N. C., 120; *Butts v. Screws, Id.,* 218; *Foote v. Gooch,* 96 N. C., 270; *Overman v. Sasser,* 107 N. C., 463.

Overruled: Clayton v. Hester, 80 N. C., 277.

MARTHA TIMMONS v. NOAH WESTMORELAND.

Where the gravamen of the plaintiff's complaint is that the execution of a certain deed was procured by fraud and undue influence, it is error to submit to the jury issues which involve matters of evidence only tending to establish or deny the main issue.

(*Lea v. Pearce,* 68 N. C., 76, cited and approved).

ACTION, tried before *Wilson, J.,* at Fall Term, 1874, STOKES.

This was an action originally commenced by Polly (588) Timmons against the defendant Noah Westmoreland to cancel a deed which the defendant, as the plaintiff alleged, had procured her to execute by false representations and the use of improper influences. There was evidence tending to prove the following allegations:

The plaintiff was tenant in common with her sister, Martha Timmons, of a tract of land in Stokes County, subject to the dower of the widow of Isaac Timmons. She was an illiterate

woman and very ignorant. The defendant, as the plaintiff alleged, induced her to believe that he was her best friend, and persuaded her that the best thing she could do with her land was to convey it to him, subject to the life estate of plaintiff, and in consideration thereof he would take care of the plaintiff and her father for their lives. The plaintiff agreed to this proposition, and shortly afterwards the defendant came by the house of the plaintiff, and at his solicitation she went with him some distance from the house, where she met one John W. Westmoreland, a nephew of the defendant, and thereupon the defendant produced a paper-writing which he had told the plaintiff contained their agreement. The plaintiff alleged that, believing the statement of the defendant, she signed the paper in the presence of the defendant and his nephew. That the paper was not read to her, nor did she have any intimation of what it contained until some time after, when she was informed that she had conveyed to the defendant all her interest in the land.

The plaintiff further alleged that she had received no consideration for the land.

The defendant alleged that prior to the purchase of the land, from time to time he was applied to by the plaintiff, when in necessitous circumstances, for the necessaries of life, for aid in the way of money, and otherwise for the supply of her wants; and from time to time, when so applied to, he furnished her with money to buy provisions, and at one time let her have one hundred and four dollars; and that these advancements were made with the understanding that he
(589) was to be paid or secured as to them by a sale of the land to defendant, and that under this agreement he made advances, amounting in all to two hundred dollars; that plaintiff had nothing to reimburse defendant's advances; that he desired to buy the land and thus secure himself; that he did apply to her and propose to take her land for his debt, allowing her to live on the land, and that he would employ her to cook for his laborers. That when the deed was prepared the plaintiff named a witness herself, a kinsman of plaintiff and also of defendant, as a person who should witness the deed, and desired him to be present at the time and place appointed for that purpose; that at her request the de-

fendant so notified him; that he attended; that the deed was read to plaintiff, or at least all of the material parts, and fully explained by the said witness, and that she freely and voluntarily executed the same, and that plaintiff understood what she was doing.

At Fall Term, 1872, the death of the plaintiff was suggested and Martha Timmons made plaintiff.

At Fall Term, 1874, the plaintiff presented the following issues, to-wit:

1. Was Polly Timmons induced by the false and fraudulent representations of the defendant to execute the deed?

2. Did Polly Timmons freely execute the deed, knowing at the time that it was a deed conveying away her estate in the land?

3. Was the deed read over to Polly Timmons?

4. Was there any consideration paid therefor, and if so, how much?

5. What was the value of Polly Timmons' interest in the land incumbered by the dower?

The following issues were presented by the defendant, to-wit:

1. Is Polly Timmons dead?

2. Is the father of Polly Timmons dead?

3. Did Polly Timmons request the deed to be read to her, and was it refused?

4. Did Polly Timmons execute the deed freely and (590) of her own accord?

5. Did the defendant furnish money and provisions, or either; and if so, to what amount?

The Court in setting the issues adopted the second issue presented by the plaintiff, and modified all the others presented by the plaintiff, at the instance of the defendant, in such a manner as to be acceptable to him, except the third, which the Court stated was unnecessary, but did not strike it out.

To these issues the jury responded as follows:

1. Polly Timmons was induced by the false and fraudulent representations of the defendant to execute the deed.

2. Polly Timmons did not freely execute the deed, knowing at the time that it was a deed conveying away her estate in the land.

3. The deed was not read over to Polly Timmons.

4. There was no consideration paid for the land.

5. The value of Polly Timmons' interest in the land was seven hundred and sixty-one dollars in all.

The defendant moved the Court to set aside the issues and the findings thereon:

1. For his failure to modify the issues as requested.

2. Because the general averments in the complaint as to artifice and fraud and false representations did not justify any issue under said complaint.

The Court refused to set aside the issues.

The plaintiff moved the Court for leave to amend the complaint, so as to make it conform to the facts.

The defendant objected; the objection was overruled, and the motion was granted.

Judgment was rendered in favor of the plaintiff, and the deed in controversy declared not to be the act and deed of Polly Timmons, and that she was not bound thereby. It was further adjudged and declared that the said deed in the hands of the defendant be set aside and cancelled, and that the defendant surrender the same to the plaintiff for can-
(591) cellation. From this judgment the defendant appealed.

Dillard & Gilmer, and *Shipp & Bailey,* for appellant.
Scales & Scales, contra.

PEARSON, C. J. The object of the action is to set aside a deed on the ground that its execution was procured by fraud and undue influence; that is the *gravamen* of the complaint, and there should not have been any other issue submitted to the jury. For the reason that, upon this issue, evidence of all of the facts and circumstances set out in the complaint, as tending to establish the allegation of fraud and undue influence, and all of the facts and circumstances set out in the answer as tending to establish the defendant's denial of "fraud and undue influence," could have been offered.

So his Honor should not have allowed any other issue than "Was the execution of the deed procured by fraud or undue influence on the part of the defendant?" to be submitted to the jury; all of the "facts and circumstances" set out in the com-

plaint and answer were matters to be offered in evidence, but not matters upon which a distinct issue could be formed and submitted to a jury without leading to "obscurity and confusion."

The rule in pleading at law, "No matter can be alleged as a special plea which can be given in evidence under the general issue," furnishes an analogy and an illustration. "All issues," as well as those offered by the plaintiff, *which involved matters of evidence only upon the main issue,* should have been rejected as tending to obscurity and confusion, and such matter ought to have been left as evidence bearing upon the issue of fraud and undue influence, which was the gravamen of the action to be passed on by the jury under the instructions of the Judge, subject to review by this Court.

We see no error in the instructions of the Court which can be complained of by the defendant; on the contrary, we are satisfied that the case has been decided so as to meet the requirements of justice. A woman yields her (592) chastity and becomes hopelessly dependent upon and in the power of the defendant, who is the father of her bastard child; this may be ascribed to the impulses of nature; but when the defendant goes further and induces the poor dependent creature to make a deed to him for her land, it is shameful and shocks all ideas of honesty, to say nothing of the fact that the deed is executed *in secret,* without any consultation with her friends and without the pretext of any adequate consideration.

I am inclined to the opinion that this case should add another instance to those set out in *Lea v. Pearce,* 68 N. C., 76, to-wit: *"Trustee* and *cestui que trust,* attorney and clerk," etc., when, because of the dependent condition of the party, in order to *prevent* fraud a presumption of undue influence is made so as to put on the other party the *onus* of proving that the dealing was fair; but this case requires no such presumption, for the fact of undue influence is patent without recourse to any artificial rule of presumption. No error.

PER CURIAM. Judgment affirmed.

Cited: Ray v. Long, 132 N. C., 894.

C. A. AND E. D. GREER v. J. R. WILBAR.

The Landlord and Tenant Act does not apply to a mortgagor who is allowed to remain in possession, and on demand after default refuses to surrender possession; and the provisions of that act cannot be extended by any contrivance of lease and lessee, so as to give to the mortgagee the benefit of having summary proceedings, as against a lessee for a term of years.

(*McCombs v. Wallace*, 66 N. C., 481, cited and approved).

SUMMARY PROCEEDINGS, under the "Landlord and Tenant" Act, commenced in a Justice's Court, and carried by appeal to the Superior Court of ASHE, where it was tried be-
(593) fore *Mitchell, J.*, at Spring Term, 1874.

The case agreed by the counsel for the parties states the following facts:

At Spring Term, 1872, of Ashe Superior Court, one Willer obtained a decree for the sale of two lots, the property of and on which Wilbar, the defendant, resided, in the town of Jefferson, for the payment of a certain amount owing to him by Wilbar. The lots were sold and Willer became the purchaser.

At the Fall Term ensuing it was decreed that if Wilbar should pay to Willer $700 by the Wednesday of the next term, then the Clerk should make him a title for the lots; if he failed to pay the $700 at the time, the Clerk was to make the title to Willer. Wilbar failed to pay the $700 at the time appointed, or any part thereof; and when he was about to be turned out of possession he paid of the amount $125, and applied to the plaintiffs and informed them that he was unable to pay the balance at that time, and asked them to pay Willer $600, and take the title to the lots, letting him remain in possession for two months, when he would pay them $700 for the lots.

The plaintiffs agreed to the defendant's proposition, paid the $600 and took a deed from the Clerk. At the same time they gave to the defendant a writing by which they agreed to convey to him the two lots if he should pay to them $700 within two months. They also at the time rented the lots to the defendant for two months, reserving a pepper-corn as rent.

At the expiration of the two months Wilbar, the defendant, being unable to pay the $700, again rented the lots for two

months, reserving the same rent, and when that time expired, plaintiffs rented the lots to defendant for one month at $4.16, for which defendant gave his note.

The last renting expired on 25 February, and on 16 March plaintiffs notified defendant to surrender the possession, or they should turn him out. On 3 April plaintiffs commenced summary proceedings under the Landlord and Tenant Act, before a justice of the peace, who gave them judg- (594) ment, and the defendant appealed to the Superior Court.

On the hearing before his Honor he reversed the judgment of the Justice and gave judgment in favor of defendant. Plaintiffs appealed.

Smith & Strong, for plaintiffs.
Scott & Caldwell, for defendant.

PEARSON, J. The "Landlord and Tenant Act" does not apply to a mortgagor who is allowed to remain in possession until default in making payment, and on demand after default refuses to surrender possession. *McCombs v. Wallace,* 66 N. C., 481. The mortgagee cannot be let into possession by summary process before a justice of the peace, but has his remedy by action to foreclose, or by action to recover the land on his legal title, to which action the equitable title of the mortgagor may be interposed by way of counter-claim.

So the case of a vendee who has been let into possession, and refuses after default in payment of the whole or any part of the purchase money to surrender possession, does not come within the operation of the "Landlord and Tenant Act," for the reason that the act is confined to the simple relation of "lessor and lessee," and does not embrace the more complicated relation of vendor and vendee, who has been let into possession, when the case may involve the taking of an account to show the balance of the purchase money, and all equities are to be adjusted, which questions a justice of the peace is not competent to deal with. The remedy is by action for a specific performance, or an action for the land, to which the vendee may set up his equitable title by way of counter-claim, and have an account as to the balance of purchase money, and all equities can be adjusted *in the one action.*

In our case, besides the relation of mortgagee and mortgagor, allowed to retain possession until default in payment, there is *the cunning contrivance* of the form of the (595) relation of lessor and lessee—in order to extend the operation of the "Landlord and Tenant Act" so as to give the mortgagor the benefit of having summary process as against a lessee for a term of years. So the plaintiffs, not content with *befriending* the defendant by a loan of $600 upon an agreement to pay $700 at the end of two months, secured by a deed for the land, with a stipulation as a part of the agreement that the defendant is to hold the possession until default, procures at the same time, and as a part of the transaction, the defendant to accept a lease for two months at the rent of a "barley-corn," for the purpose of bringing the case within the "Landlord and Tenant Act," thus forcing a necessitous man, besides paying common usury, to submit to have himself tied hand and foot, in order to evade the policy of the law, by which it is provided that when there is the complicated relation of mortgagee and mortgagor the whole matter shall be settled in one action.

We have the complicated relation of mortgagee and a mortgagor remaining in possession, and to this is added the additional relation of lessor and lessee, so as to make the relations of the parties more complicated. Can this be allowed to have the effect of taking the case out of the decision in *McCombs v. Wallace, supra?* We think not. There is the same complication arising out of the relation of mortgagee and mortgagor, the same equities to be adjusted, which a justice of the peace is not competent to deal with.

The policy of the law is defeated by a contrivance, and we have two proceedings instead of one, which it was the purpose to avoid—for, should the plaintiffs get possession by this summary process, in order to clear their title it will be necessary to bring an action to foreclose the equity of redemption, or else the defendant may have an action at any time within ten years to redeem, with a provisional remedy to protect him from being put out of possession until this equitable title is adjudicated. All of these difficulties are avoided by adhering to the principle of *McCombs v. Wallace, supra,* and by

confining the summary proceeding to the case of the (596) simple relation of lessor and lessee who hold over after the expiration of his term, when there is no other relation to complicate the question. We have the primary and main relation growing out of a mortgage, and the secondary and incidental relation of lessor and lessee, adopted as a contrivance to eject the mortgagee, on short notice, leaving the controversy open for future litigation. The policy of the law cannot be thus evaded and the "Landlord and Tenant Act" cannot "by this form" of a "lease for a *barley-corn*" be made to apply to a case outside of the simple relation of landlord and a tenant, who holds over: when the mischief is, that the landlord will be put to inconvenience and loss, unless the tenant gives up possession in time to have his place supplied, with reference to the next crop, and there is no difficulty in respect to the title, or complication in respect to adjustment of equities. No error.

PER CURIAM. Judgment affirmed.

Cited: McMillan v. Love, ante, 19; *Johnson v. Hauser,* 82 N. C., 376; *Parker v. Allen,* 84 N. C., 468; *Hughes v. Mason, Id.,* 478; *Allen v. Taylor,* 96 N. C., 41; *Bank v. Loughran,* 122 N. C., 673; *Smith v. Garris,* 131 N. C., 36.

YANCY BALLINGER v. STEPHEN ELLIOTT.

A citizen of another State voluntarily attending one of our Superior Courts as a witness, is privileged from arrest in civil cases although no subpœna has been served on him.

MOTION to vacate an order of arrest, heard by *Tourgee, J.,* at chambers, in GUILFORD, 25 January, 1875.

The defendant lived in Indiana, and had come to Greensboro at the request of counsel to give evidence in a certain action then pending in the Superior Court of Guilford, wherein Hittle was plaintiff, and Ballinger, the plaintiff in this action, was defendant. He, the defendant (597) Elliott, was under no subpœna, summons or other judicial process requiring his attendance, nor was any ever issued.

The plaintiff had commenced a civil action against the defendant, and obtained an order of arrest, under which he was held to bail four days before the commencement of the Fall Term of the Court, for his appearance, etc., at the March Term ensuing.

The defendant soon after his arrest moved before the Clerk of the Court to vacate the order, upon the ground that he was a witness in attendance upon the Fall Term of the Court, in the action above stated, and was therefore protected under the law from the service of civil process. The Clerk refused his motion to vacate the order, and the defendant appealed to his Honor.

On the hearing at chambers his Honor reversed the Clerk's order, and the plaintiff appealed.

Scott & Caldwell, Scales & Scales, Mendenhall & Staples, and *Shipp & Bailey,* for appellant.

J. T. Morehead, Jr., and *Dillard & Gilmer, contra.*

RODMAN, J. The defendant was arrested upon an order made by the Clerk of the Superior Court of Guilford County, in an action brought against him by the plaintiff for deceit, etc. The defendant resides in Indiana, and at the time of his arrest, which was a few days before a term of the Superior Court of said county, he had come to said county at the request of one Hittle, who was a plaintiff in an action pending in that Court against the present plaintiff (Ballinger), as a witness for Hittle in that action. His attendance was voluntary, and he was not served with a subpœna after his arrival in Guilford County.

The authorities cited for the defendant establish that he was privileged from arrest, notwithstanding he was attending voluntarily and not under a *subpœna.* There is no (598) way to compel the attendance of witnesses from other States, and it would be against public policy, and to discourage their attendance, if upon their arrival here they could be arrested. The plaintiff is put in no worse condition by the discharge of the defendant than he was before. The principal authorities on the privilege of witnesses, suitors, etc., from arrest may be found cited in 1 Greenl. Ev., sec.

316. Those most to the point in the present case are *Walpole v. Alexander,* 3 Doug., 45 (26 E. C. R.), and *Norris v. Beach,* 2 Johns. (N. Y.), 294.

PER CURIAM. Affirmed.

Cited: Cooper v. Wyman, 122 N. C., 786.

STATE v. JOHN OUTLAW.

1. A storehouse which is used as a regular sleeping apartment, although so used for the sole purpose of protecting the premises, is a dwelling-house in which burglary may be committed.

2. In an indictment for burglary, where the house alleged to have been broken into was a dwelling-house belonging to A, though occupied by one of his employees: *Held,* that charging in the indictment the house as "the dwelling-house of A," instead of "a dwelling-house of A," etc., is not such an inaccuracy as to vitiate the indictment.

3. It is settled that if the servant, clerk, or employee, occupy the house broken into, but have no estate therein as lessee, or tenant at will, or a tenant at sufferance, it should be charged to be the dwelling-house of the owner.

(*State v. Jenkins,* 50 N. C., 480, cited and approved).

INDICTMENT FOR BURGLARY, tried before *Kerr, J.,* at Fall Term, 1874, PERSON.

The defendant, John Outlaw, was charged with burglary in two counts, the first charging the house broken into as the dwelling-house of one John W. Cunningham, and the second as the house of one James E. Harris.

Upon the trial the Court directed ten talesmen to be (599) summoned from the bystanders, in addition to the original panel. When the original panel was exhausted, these names were put into a hat and drawn out, without the prisoner being informed of his right to challenge thereto. The prisoner did, however, challenge one of the talesmen.

On the trial it was proved that the prisoner did forcibly enter, in the night-time, a storehouse, the property of John W. Cunningham, one room of which was occupied as the regular sleeping apartment of James E. Harris, a clerk of Cun-

ningham, which room was also used as a counting-room. The store was distant about one hundred and fifty yards from the dwelling-house of Cunningham. Harris boarded with the family of Cunningham, and had done so for more than four years before the alleged burglary.

The witnesses, Terrell and Cunningham, stated that Harris had no interest in the house, but slept in the store for the protection of the premises. He slept there regularly.

No evidence was offered by the defense. Before the argument, the prisoner's counsel moved the Court to require the Solicitor to elect on which count he would prosecute, which motion was refused.

The prisoner asked the Court to charge the jury that the clerk, Harris, not being the servant of Cunningham, his occupancy of a portion of the building did not make it the dwelling of Cunningham, and as to Harris, there was no evidence that he had any interest in the premises, and as he slept there just to take care of them, there could be no conviction on the second count.

The Court refused to charge as requested, and instructed the jury, among other things, "that the occupancy of a part of the building broken into, by Cunningham's clerk as his regular sleeping apartment, constituted it the dwelling-house of Cunningham," and that "a building occupied by a servant or any employee of the owner as a sleeping apartment, is a dwelling-house of the owner," and also "that if they believed that

(600) Harris was the clerk of Cunningham, and slept in the store to enhance the security of the premises, he had such a special property in the building as to justify them in finding the prisoner guilty on the second count."

The jury rendered a verdict of guilty, and the prisoner moved for a new trial, on the grounds:

1. That the prisoner was not properly informed as to his right of challenge.

2. That the Court erred in refusing the motion to require the Solicitor to elect between the two counts in the indictment, at the conclusion of the testimony.

3. That the Court erred in instructing the jury that the occupancy of a part of the storehouse broken, by the clerk of Cunningham as a sleeping apartment, constituted it the dwelling-house of Cunningham.

4. That the Court erred in instructing the jury that if they believed Harris to be the clerk of Cunningham, and regularly slept in the store, he had such a special property in the premises as would justify a verdict upon the second count.

5. That there was error in the Court refusing to instruct the jury that there was no evidence that Harris had any interest in the premises, and consequently there could be no verdict on the second count.

6. That the Court erred in instructing the jury that a building occupied by a servant or an employee of the owner, as a sleeping apartment, is the dwelling of the owner.

7. That the Court erred in instructing the jury that if Harris slept in the store regularly, although only for the purpose of enhancing the security of the property by his presence, it became thereby a dwelling-house, and the subject of burglarious entry.

The rule for a new trial was discharged, and the counsel for the prisoner then moved in arrest of judgment upon the ground that two distinct offenses were charged in the bill, and upon a general verdict no judgment could be rendered.

The motion was overruled, and sentence pro- (601) nounced, whereupon the prisoner appealed.

Tourgee, Gregory and *Barnett,* for the prisoner.
Attorney-General Hargrove, for the State.

PEARSON, C. J. As the bill of indictment contains two counts—one charging the house to be the dwelling-house of John W. Cunningham, and the other charging the house to be the dwelling-house of James E. Harris—the question as to the proper mode of charging the ownership of the house does not arise. A man may be the owner of several dwelling-houses: one in which he lives, one in which his domestic servants live, and one in which his clerks or other employees live; and it is settled by the authorities referred to in the text-books, that if the servant, clerk or employee has no estate in the house as lessee or tenant at will or at sufferance, it should be charged to be the dwelling-house of the owner.

In such cases, when the house is outside of the curtilage, the more accurate mode of charging the offense is "a dwelling-house, the property of," etc., for instance, in our case. *The*

dwelling-house of Cunningham was not the house broken into, but it was a dwelling-house of his occupied by his clerk, and the proper description would have been, "a dwelling-house, the property of John W. Cunningham, then occupied by one James E. Harris."

Suppose a manufacturing company or a railroad company own dwelling-houses in which their agents and employees live: it would be incongruous and absurd to charge it as *the* dwelling-house of the company, for although the company has a name, it can have no local habitation.

Provided this was a dwelling-house, the inaccuracy in using the definite article "the" instead of the indefinite article "a" is not according to the authorities, for the purpose is to describe the house, and this is done by charging it to be *"the* dwelling-house of Cunningham," although it could have been more accurately described as *a* dwelling-house of Cun-
(602) ningham, occupied by Harris. This case is distinguishable from *State v. Jenkins,* 50 N. C., 430. There the owner *occasionally* slept in the store-room on the counter; here the clerk had for four years occupied the counting-room as his *"regular sleeping apartment."* The case of Jenkins is made to turn on this distinction; but it is there taken to be settled law that a storehouse may be made a dwelling-house "by being used *habitually* and *usually* by the owner or his clerk as a place for sleeping, but not by being used *occasionally only* for such a purpose." Thus showing that the gist of the crime of burglary is a protection for the place where a man sleeps, and not the place where he transacts business or the place where he takes his meals, and relieving our case from any difficulty because of the fact that the clerk took his meals at the mansion-house of Mr. Cunningham. Had the case stopped here, we would have been left to draw the natural inference that the clerk made his counting-room "his regular sleeping apartment," for the reason that in the family arrangement it was convenient for him to do so, and for the further reason that his presence would be a protection to the store, and his sleeping there would make it a dwelling-house, and as such put it under the peculiar protection of the law.

But the case does not stop here. It sets out "upon the examination, the witnesses Terrell and Cunningham stated that

Harris had no interest in the premises and slept in the store-house *"just to take care of the premises,"* "though he slept there regularly." Upon this statement the counsel of the prisoner made a very ingenious and forcible argument to bring the case within the principle of *Brown's case,* where the fact of a servant having slept in a barn the night it was broken into, and for several nights before, being put there for the purpose of watching for thieves, did not make the barn a dwelling-house; and of *Smith's case,* where the fact of a porter lying in a warehouse to watch goods, being only for a particular purpose, did not make the warehouse a dwelling-house, so as to make the breaking and entering thereof burglary. See 2 East Pl. Cr., 497, 501. A majority (603) of the Justices are of opinion that the words *"just to take care of the premises,"* taken in connection with the words, "though he slept there regularly," mean that he slept there regularly in order to take care of the goods; in other words, he made it a dwelling-house "just to take care of the premises," and, if you will have it, *solely* for that purpose. But he did make it his *regular sleeping apartment,* and it thereby became a dwelling-house. Two of the Justices have grave doubts and conceive it to be a stretch of the law, not in favor of, but against life.

Pursuing the precedents in the English courts when the Judges are divided in opinion, we will recommend to his Excellency the Governor to commute the sentence of death into a sentence of confinement in the penitentiary for ten years, or such other time as may seem to him will be an adequate punishment for the crime of larceny: *Provided,* that the prisoner when called on at the next term of the Superior Court to say "why the sentence of death shall not be pronounced," will plead the grant of commutation as a bar of the penalty of death, and submit to such judgment as the Court may render.

PER CURIAM. No error.

Cited: S. v. Potts, 75 N. C., 130; *S. v. Williams,* 90 N. C., 726; *S. v. Pressley, Id.,* 732-3; *S. v. Foster,* 129 N. C., 707.

M. Z. FOLGER v. WILLIAM BOWLES.

A vendor, who has sold land and given a bond to make title when the price is paid, and who has paid a part of such price, has no interest in the land which can be sold under an execution.

(*Tally v. Reid, ante*, 336, cited and approved).

EJECTMENT, tried before *Cannon, J.*, at Fall Term, 1873, SURRY.

(604) The plaintiff claimed title to the land in controversy, under a deed made in pursuance of an execution under a judgment of a justice of the peace against one Elizabeth Butcher. There was no controversy as to the regularity of the proceedings under which the deed was executed. The defendant admitted himself in possession of the land in controversy, and claimed title thereto under the same Elizabeth Butcher. It was admitted that Elizabeth Butcher had only a life estate in the land. The defendant showed a deed from Elizabeth Butcher, conveying two-thirds of said land to him, dated 8 May, 1858, and also a bond for title to said land, dated 25 February, 1856. A part of the purchase money had been paid.

The plaintiff asked his Honor to instruct the jury that notwithstanding the title bond of Elizabeth Butcher was outstanding at the day of the levy, still the plaintiff, by the said levy and the proceedings thereon, acquired the legal title, and the legal title alone being in question, the plaintiff would be entitled to recover the legal title subject to the equity of the defendant.

The defendant insisted that Elizabeth Butcher had no interest in the land described in the complaint which was subject to sale under execution, and therefore the plaintiff was not entitled to recover. The Court being of opinion with the defendant, so instructed the jury.

The jury rendered a verdict in favor of the defendant, whereupon the plaintiff moved for a new trial. Motion for a new trial was overruled, and thereupon the plaintiff appealed, upon the following ground:

The Court erred in instructing the jury that a defendant in execution, who had contracted to sell his land and given bond

for title and had received a part, but not all, of the purchase money, had no such interest in land as was subject to sale under execution.

Masten, for appellant.
McCorkle & Bailey, contra.

READE, J. The question involved in this case is the (605) same as in *Tally v. Reid, ante*, 336, where it is fully considered; and the principles there laid down govern this. A vendor who has sold land, given a bond for title when the price is paid, a part of which has been paid, has no interest in the land which can be sold under execution. There is no error.

PER CURIAM. Judgment affirmed.

STATE v. ROBERT A. OWEN.

1. Where upon an indictment for murder, several persons were sworn in the regular way, as to their competency to serve as jurors, and held the Bible in their hands until they were accepted, when the Clerk proceeded to swear them as jurors, omitting the words "you swear" in the last oath: *It was held*, that the omission, though irregular and reprehensible, did not vitiate the verdict.

2. Where the presiding Judge, on a trial of an indictment for murder, charged the jury: "The State's counsel says he has introduced Dr. Richardson, an intelligent physician, who gives it as his decided opinion, after hearing all the testimony, 'that the deceased came to his death by strangulation and not by poison,' and that this ought to have great weight with the jury"; and then immediately added: "It is true the opinion of experts ought to have weight with the jury, as they are familiar with these questions; but the jury are not concluded by their opinions; if the evidence justifies, they may find against such opinion. They must find the facts upon the whole evidence": *Held*, that this was not an expression of opinion, and not prejudicial to the prisoner.

(*State v. Cunningham, ante*, 469, affirmed).

INDICTMENT for murder, tried before *Schenck, J.*, at Fall Term, 1874, LINCOLN.

The prisoner, Robert A. Owen, was charged with the murder of John W. Cheek, in the county of Gaston, on 24
(606) September, 1873.

The case was removed from Gaston County upon the affidavit of the prisoner, and when called on the first Tuesday of the Fall Term of Lincoln Superior Court was continued on the affidavit of the prosecutor, suggesting a diminution of the transcript of the record sent from the Superior Court of Gaston County.

A *certiorari* was issued to the Clerk of the Superior Court of said county commanding him to send a perfect copy of the record in this case to Lincoln Superior Court, and on the next day E. H. Withers, Clerk of that Court, returned a record in the case as a perfect record thereof, which record was filed in the Superior Court of Lincoln County.

The case was again continued, upon the affidavit of the prisoner, until Tuesday of the second week of the term, on account of the absence of material witnesses. On Tuesday of the second week of the term the case was again called, and before going into the trial the counsel for the prisoner suggested a diminution of the record in the case, in that it did not show an order for removal in the case from Gaston to Lincoln.

The Court being satisfied from the first and amended record filed in the case, that there was no diminution, and because that one *certiorari* had already issued in the case and a return been made thereon, overruled the motion for a *certiorari*. The defendant excepted, and the exception was overruled. The trial proceeded, and after the original panel was exhausted the prisoner challenged the array of the special *venire* because the Court had no power to continue the special *venire* from the day on which they were summoned to attend to Tuesday of the second week. The challenge was overruled, and the prisoner excepted.

One of the special *venire* having been challenged for cause by the defendant, and sworn, was asked if he had paid his taxes for the year 1874, to which he replied that he had not,
but stated in answer to the Court that he had paid his
(607) taxes for the year 1873.

The defendant challenged him for cause, assigning as the cause that he had not paid his taxes for 1874.

The challenge was overruled by the Court, and the defendant excepted.

One Samuel Black of the special *venire* had been stood aside by the State, and when recalled and sworn, no cause was found for challenge. The State then challenged him peremptorily. The defendant excepted.

The requisite number of jurors being obtained, before they were impaneled the prisoner asked to be permitted to withdraw his plea of "Not guilty," and to plead in abatement, and offered to file his plea, which he had prepared.

The Court refused to allow the plea of not guilty to be withdrawn or the plea in abatement to be filed. Defendant excepted.

When the jurors were called and challenged, the Clerk caused them to place their hands on the Bible and said, "You swear that you will true answer make to such questions as may be asked you touching your competency as a juror," and made them retain the Bible in their hands; and when the prisoner answered that "he liked him," the Clerk continued in these words as to several of the jurors, "You will well and truly try and true deliverance make between the State and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence: so help you, God," and the jurors kissed the Bible and were seated in the box.

The word "swear" or "affirm" was omitted in several instances between the words "you" and "will well and truly," etc., in the latter part of the oath.

A member of the bar called the attention of the counsel of the prisoner to the omission, but no exception was made to it. The Court was not aware of the omission, nor was its attention called to it, and the matter was not alluded to until after the trial. After the jurors were all seated, the Court, in hearing of the counsel for the defendant, asked them whether they had all been sworn, and they responded (608) in the affirmative, and were regularly impaneled by the Clerk. No exception was made by the defendant's counsel.

No evidence was introduced by the defendant. The evidence for the State showed that on Monday, 22 September, 1873, the prisoner and the deceased left York County, South

Carolina, in a two-horse wagon belonging to deceased, and came to North Carolina for the purpose of buying a plantation for the deceased. They went as far as Shelby on Tuesday, and perhaps further; on Wednesday they were again in Shelby drinking, and the prisoner and the deceased had angry words about the prisoner taking some money of the deceased —as prisoner said, to take care of it—and there was some evidence of the drugging of the liquor which they bought by the prisoner. Thursday they left Shelby, and on Friday morning about 9 o'clock were in Dallas, Gaston County. Both were strangers in Gaston County, especially the deceased, who knew no one, and was known by no one, so far as the testimony showed. On that day (Friday) at 9 o'clock the deceased was in the wagon, seemingly asleep and insensible, the prisoner alleging that he was drunk and giving him great trouble.

On the same day at 10 o'clock the prisoner went with the wagon to Joseph Thornberg's, seven miles west of Dallas; deceased was still in the wagon in an insensible state and remained so until 3 o'clock, at which time the prisoner drove off, as he said, to meet another wagon, and send the deceased home. The prisoner returned to Thornberg's about dusk, the deceased not being with him, and the prisoner alleged that he had sent the deceased on home in another wagon. The next morning the prisoner left with one of the horses and was not caught until December. On Saturday morning, suspicions being aroused, and blood found in the wagon and on the clothes, search was made and the body of a deceased person was found behind a pine log, with a pistol shot ranging from near the left nipple around the left side, where it came out and passed through the arm. The body also had a
(609) half-inch hemp rope tied tightly around the neck, sunk into the flesh, and the face was swollen and discolored.

The trail where the body was dragged was also discovered. The body was found on Saturday about 3 o'clock P. M.

One B. M. Carpenter stated that he saw the body Saturday night where it was found; that a crowd had assembled to hold an inquest; that he examined the pockets of the deceased before he was stripped, to see if he could find any memorandum or papers by which he could identify the person of the de-

ceased. The witness was asked "what he found on the body or in the pockets." The prisoner's counsel excepted to this question, and the exception was overruled by the Court. The witness stated that he found a small memorandum or pocket-book in the pocket of the deceased, which was exhibited. Witness said it contained names of people living in South Carolina, memoranda, and a five-cent piece and two pairs of spectacles, one with and the other without a case.

There was evidence given by the State to fix the prisoner with the murder of the deceased. The prisoner introduced no evidence, and it was argued to the jury upon the evidence introduced by the State.

The counsel for the defense asked the Court to charge the jury: 1. That if the jury had a reasonable doubt which way the deceased came to his death, the prisoner was entitled to a verdict.

2. That if they had a reasonable doubt that the deceased came to his death in manner and form as charged by the bill of indictment, the defendant should be acquitted.

The Court after defining murder as the "killing of a fellow-being in malice," charged the jury that it was the duty of the State to satisfy their minds beyond a reasonable doubt:

1. That the prisoner killed the deceased.

2. That he killed him as charged in the bill of indictment, by a pistol shot or by strangulation.

3. That if they had a reasonable doubt whether the deceased came to his death by the means charged in (610) the indictment, the prisoner was entitled to the doubt, and they must acquit.

The Court recited the whole testimony given in the case and summed up the argument of the counsel on either side. In stating the argument for the prosecution the Court used this language: "The State's counsel says he has introduced Dr. Richardson, an intelligent physician, who gives it as his decided opinion, after hearing all the testimony, that deceased came to his death by strangulation and not by poison, and that this ought to have great weight with the jury." The Court added: "It is true that the opinion of experts ought to have weight with the jury, as they are familiar with these questions; but the jury are not concluded by their opinion; that if

the evidence justified, they might find against such opinion; that they must find the facts on the whole evidence."

The jury returned a verdict of guilty of the felony and murder as charged in the bill of indictment.

The counsel for the prisoner then moved the Court for a new trial:

1. Because of error in overruling the challenge in the case of the juror Peter ———.

2. Because of error in overruling the objection to Carpenter's testimony.

3. Because of error in refusing to allow the plea of "Not guilty" to be withdrawn, and a plea in abatement filed.

4. Because of error in the charge in regard to Dr. Richardson's testimony.

5. Because the jurors were not properly sworn.

The motion for a new trial was overruled, and the defendant moved in arrest of judgment, on the following grounds:

1. That the jurors were not properly sworn.

2. That the word "given" is used in the indictment instead of "giving."

3. That the transcript does not show that the case was removed to the county of Lincoln.

The motion was overruled, and the prisoner appealed.

(611) *Hoke* and *Bailey,* for the prisoner.
Attorney-General Hargrove, for the State.

SETTLE, J. The record shows that several exceptions were taken to the rulings of his Honor during the progress of the trial, but only two of them were insisted upon in this Court. Treating the others as abandoned—and a casual glance will suffice to show that they were properly abandoned—we will only notice those which were pressed upon the argument here.

2. The jurors were not properly sworn. The facts, as we find them in the record, are as follows: When the jurors were called and challenged, the Clerk caused them to place their hand on the Bible, and said: "You swear that you will true answers make to such questions as may be asked you touching your competency as a juror." The jurors were required to retain the Bible in their hand, and when they were accepted by the prisoner, the Clerk continued in these words, as to several

of the jurors: "You will well and truly try and true deliverance make between the State and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to your evidence: so help you, God." And the juror would then kiss the Bible and take his seat in the box.

The word "swear" or "affirm" was omitted in several instances between the words *you* and *will well and truly*, etc., in the oath. No exception was made to this manner of administering the oath, although the attention of the prisoner's counsel was called to it at the time. The Court was not aware of the omission until after the trial was over. After the twelve jurors had been seated, the Court asked them if they had all been sworn, and they responded in the affirmative, and were regularly impaneled without exception from the prisoner.

After the frequent admonitions from the courts not to depart from established forms and precedents, it would seem useless to say more on the subject, for it is all evidently lost upon many of those who do not hesitate to assume the responsibility of office. (612)

Why the Clerk, with the oath prescribed for jurors in capital cases before him, should have presumed to have experimented in changing it, is only to be accounted for upon the supposition that he does not appreciate the importance of such matters. He doubtless thought that the words "you swear," at the commencement of the oath of jurors, to answer questions touching their competency to serve as jurors, might be referred to the second oath, which they took after their acceptance as jurors, they retaining the Bible in their hand all the time; and this perhaps may be so. But independent of that, the essential requirements of the law are that the party sworn "shall lay his hand upon the Holy Evangelist of Almighty God," and after the oath is administered he shall invoke the blessing or the curse of God by repeating the words, "So help me, God," and shall kiss the Holy Gospel as a seal of confirmation to his engagements. Bat. Rev., ch. 77, sec. 1.

In the case at bar all of this was done. Although the omission of the words "you swear" at the commencement of the oath looks awkward and mars the comeliness of judicial proceedings, we do not think that it vitiates the oath.

2. The prisoner excepts to the charge of his Honor in reference to the testimony of Dr. Richardson. He contends that it amounted to an expression of opinion to his prejudice by his Honor.

After reciting the whole testimony in the case, his Honor summed up the arguments of counsel, both for the prisoner and the State. In stating the argument for the prosecution, he said: "The State's counsel has introduced Dr. Richardson, an intelligent physician, who gives it as his decided opinion, after hearing all the testimony, that the deceased came to his death by strangulation, and not by poison, and that this ought to have great weight with the jury." But his Honor immediately added: "It is true, the opinion of experts ought to have weight with the jury, as they are familiar with
(613) these questions; but the jury are not concluded by their opinion; if the evidence justifies, they may find against such opinion; they must find the facts upon the whole evidence."

This was more of a reply to the position assumed by the State's counsel than an unqualified endorsement of the same, and was calculated to give the jury a fair view of the question involved in Dr. Richardson's testimony, to-wit, the manner in which the deceased came to his death; and to explain to them their duty in reference to the decision of that question. The charge is not open to the criticism which has been made upon it.

Another question, which arises upon the record in consequence of the removal of the case from one county to another, has been decided, *State v. Cunningham, ante,* 469. On this point we content ourselves with a reference to that case.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Flynt v. Bodenhamer, 80 N. C., 208; *Blue v. R. R.,* 117 N. C., 648.

BURROUGHS & SPRINGS and M. N. HART v. THE BANK OF CHARLOTTE.

(For syllabus and facts, see same case in 70 N. C., 283).

ACTION, tried before *Schenck, J.*, at January Term, 1875, MECKLENBURG. It was originally tried before *Moore, J.*, at July Term, 1873, of MECKLENBURG, upon a case agreed, and is fully reported 70 N. C., 283.

His Honor gave judgment against the defendant, who appealed, and in this Court the judgment below was reversed and the case remanded.

The case coming on to be heard upon the certificate (614) of the Supreme Court, was by consent referred to T. W. Dewey and J. H. McAden to ascertain the value of the notes, who reported that they were worth fifty per cent. of their face value. No exception was filed to the report, and it was confirmed by the Court.

At Fall Term, 1874, the attorney for the defendant moved:

1. That he be allowed to file affidavits with a view to a modification and amendment of the case agreed, as filed in the papers, in order to show that there was an agreement between Taylor and the cashier of the Bank of Charlotte that the bills were to be bought to discharge Taylor's debt, and that Taylor purchased them with that understanding.

2. That Taylor deposited the bills with the First National Bank to secure the note on which the purchase money was raised.

This was objected to by the plaintiff, who insisted that he was entitled to a judgment according to the case agreed.

The Court overruled the motion, and the case was then argued on the case agreed, and judgment rendered against the defendant.

By request of the counsel for the defendant, the Court stated that judgment was rendered against the defendant *in invitum*.

From this judgment the defendant appealed.

Wilson & Son, for appellant.
Jones & Johnston, contra.

RODMAN, J. The present appeal did not bring up for review our opinion reported 70 N. C., 283. Nevertheless, at the request of the counsel for the defendant, we have reconsidered the reasoning of that opinion, and we find in it nothing of which we do not now approve.

In that opinion we said, as we then thought, with sufficient clearness, that the bank-notes in question were first subject to the payment of Taylor's note to the First National Bank of Charlotte, and if any remained after such payment, it (615) was the property of Taylor, and to the extent of his interest the Bank of Charlotte could set off his indebtedness to it to any action on the notes.

In the opinion the value of the notes was assumed to be what Taylor paid for them, viz., 60 cents in the dollar, merely as an illustration and to abbreviate the argument. It now appears that their value has been found to be only 50 cents in the dollar, and that the whole of them are required to pay the note of Taylor for which they were deposited as a collateral security. Consequently, Taylor has no interest in them; they all belong to Hart, the assignee of the bank, and the Bank of Charlotte has no ground to set up a counter-claim by reason of Taylor's indebtedness to them. The bank herein loses nothing to which it is equitably entitled. It has a set-off to any demand of Taylor; but if Taylor has no demand against it, its claim against him is, of course, unavoidable in that way. Hart is like any other *bona fide* holder, and as such may claim the full amount of the bank. To allow the Bank of Charlotte to set off the extent of the interest which Taylor was *supposed* to have had, to the injury of the First National Bank or its assignee, when it turns out that Taylor's interest is of no value, would be to give to a mere equity of redemption a priority over the mortgage debt. No error.

PER CURIAM. Affirmed.

(616)

FRANCIS HODGE v. MADISON HODGE.

1. The Probate Court has exclusive original jurisdiction of special proceedings to recover legacies and distributive shares:

2. This rule is subject to the exception, that when the assent of the executor amounts to an express or implied promise to pay a legacy or distributive share, it becomes a debt, recoverable like any other debt, in the Superior Court.

3. Although it is a general rule that the assent of the executor to the first taker of a legacy, limited over on a particular estate by way of remainder or executory bequest, is an assent to all persons in remainder, yet such assent cannot be construed into a promise on the part of the executor to pay the legacy a second time to the remainderman, when he has once paid it to the first legatee.

4. The Superior Court did not acquire original jurisdiction of actions to recover legacies by the passage of the Act of 1872-'73, entitled "An act to cure defects in certain judicial proceedings arising from mistakes of jurisdiction and other causes."

5. Where personal chattels are limited to one for life, with a limitation over, the first legatee cannot be compelled to give security for the delivery of such chattels to the remainderman, after the determination of his life estate, and an executor commits no *devastavit* in paying such legacy to the first legatee without security.

(*Miller v. Reams*, 65 N. C., 67; *Williams v. Cotton*, 56 N. C., 395; *Camp v. Smith*, 68 N. C., 537).

ACTION for the recovery of a legacy, tried before *Watts, J.*, at Fall Term, 1873, WAKE.

The plaintiff, in his complaint, alleged that by the will of William T. Hodge the sum of twelve hundred and fifty dollars was given to the use and benefit of Henderson A. Hodge for life, and then to the use and benefit of the plaintiff for life, and then to be divided between all the children of Henderson A. Hodge; that by said will the defendant, Madison C. Hodge, and Henderson A. Hodge were appointed his executors, and duly qualified as such; that the defendant collected the money of the estate and had the absolute control thereof; that the defendant assented to said legacy and paid over said sum to Henderson A. Hodge, his co-executor, (617) and also the husband of plaintiff, without requiring of him any security.

Plaintiff further alleged that Henderson A. Hodge died on 17 September, 1870, insolvent, and plaintiff qualified as his

executrix; that the sum of $142.62 had been paid for his estate towards said legacy, and but little, if anything more, can be expected from this source.

The defendant demurred to the complaint, insisting that the Superior Court had no original jurisdiction thereof, because the action was brought against the defendant as surviving executor of the last will and testament of W. T. Hodge, to recover a legacy given the plaintiff for life by said last will and testament, and the summons therein made returnable, and the complaint therein filed before the Judge of the Superior Court, sitting in term-time; whereas the summons should have been made returnable before and the complaint filed in the Probate Court.

His Honor overruled the demurrer to the jurisdiction, and ordered the defendant to answer, whereupon the defendant appealed.

Haywood, for the appellant.
Fowle, contra.

SETTLE, J. This is an action to recover a legacy, made returnable before the Court at the regular Fall Term, 1873.

There is a demurrer to the jurisdiction. The Probate Court has exclusive original jurisdiction of special proceedings to recover legacies and distributive shares.

This rule is subject to the exception that when the assent of the executor amounts to an express or implied promise to pay a legacy or distributive share, it becomes a debt, recoverable like any other debt in the Superior Court. *Miller v. Barnes,* 65 N. C., 67.

And while it is a general rule that the assent of the executor to the first taker of a legacy, limited over on a particular estate by way of remainder or executory bequest, is an assent to all persons in remainder, yet such assent cannot be construed to amount to a promise on the part of the executor to pay the legacy a second time to the remainderman, when he has once paid it to the first legatee.

(618)

Since, then, there was no promise which would take this case out of the general rule, the jurisdiction remains with the Probate Court, unless the want of jurisdiction in the Supe-

rior Court is cured by the Act of 1872-'73, ch. 187, entitled "An act to cure defects in certain judicial proceedings arising from mistakes of jurisdiction and other causes," ratified 3 March, 1873. This action was instituted subsequent to the passage of the act just cited, which only professed to cure past defects in the manner of bringing suits.

But Battle's Revisal, ch. 17, secs. 425 and 426, brings forward this act, and as the Revisal went into operation since the commencement of this action, the question arises, What effect is to be given to the fact that it brings forward the curative act? As no portion of the Revisal, except ch. 121, was ever read and enacted by the General Assembly, as prescribed by the Constitution, it cannot be pretended that any of the enactments therein found, except ch. 121, derive any force and effect from the Revisal, but they all depend upon the original acts which put them in force; and, at this term we have held, in the *State v. Cunningham, ante,* 469, that a very limited operation is to be given to the repealing clause of ch. 121. We conclude that the Revisal, though a very useful and convenient collection and compilation of the public statute-law of the State, enacts nothing, and repeals but little of the public law heretofore in force. So much for the question of jurisdiction, which is sufficient to dispose of this appeal; but since we have heard full argument upon the merits, we will, in order to end litigation, decide the main question at issue.

Was the defendant guilty of a *devastavit* in paying the pecuniary legacy to Henderson A. Hodge, without security for its safety, and is he liable to pay it a second (619) time, to the plaintiff, who is the widow of the said Henderson, and entitled under the will, after the death of the said Henderson, to the use and benefit of the legacy for her life?

An executor is not a trustee, in the technical meaning of that term, and as it is the policy of the law to induce persons to accept the offices of executor and administrator, the courts, while guarding against an abuse of their trusts, are extremely liberal in making possible allowance, and are cautious not to hold executors and administrators liable on slight grounds. 2 Williams Exrs., p. 1630.

They are not governed by the rigid rules which apply to trustees in the more defined acceptation of that term. As to

personal chattels, the rule is well established that where they are given to one for life, with remainder over to another, the first legatee will be entitled to the possession of the goods, upon securing and delivering to the executor an inventory of them admitting their receipt, and expressing that he is entitled to them for life, and that afterwards they belong to the person in remainder. Formerly the tenant for life was required to give security for the protection of the remainderman, but such security is not now required, unless a case of danger is shown. In *Williams v. Cotton,* 56 N. C., 395, this Court, after affirming this general rule, says: "The same rule, we think, must apply to the money legacies; and all that the executor can be required to do is to take a receipt from the legatees, or from their guardians, if they be minors, for the articles or *money* delivered or paid to them, for the benefit of those who may, upon the happening of the contingency mentioned in the will, become entitled to it."

And it is said in the same case: "The executor, after giving his assent, will have nothing more to do with the property, and it will be left with the person having such executory and contingent interest to apply to the Court for its protective aid, whenever the property is really in danger of being re-
(620) moved, wasted or destroyed."

In *Camp v. Smith,* 68 N. C., 537, the testator bequeathed as follows: "To my three daughters, Martha Jane, Mariana C. and Lucy Camp, each, three thousand dollars in money or bonds; and in the event of the death of either one or any of my said daughters without lawful issue, it is my will that her or their legacy shall be equally divided and heired by the survivor of my four daughters now single." The plaintiff, Martha Jane, who had never married, demanded immediate payment of her legacy. The executor contended that she was only entitled to receive the annual interest of the legacy during her life, and that the principal must remain in his hands to await the contingency of her dying without issue. This Court held that she was entitled to receive the *corpus* of the legacy, and that its ultimate devolution was a question between her and the contingent remaindermen. These decisions are fully sustained by Roper, who, in discussing the time at which legacies are to be paid, when

the bequest is of a gross sum of money, says: "When a legacy given generally, so as to fall within the above-mentioned rule, is subject to a limitation over upon a subsequent event, the divesting contingency will not prevent the legatee from receiving his legacy at the end of the year after the testator's death; and he is under no obligation to give security for repayment of the money in case the event shall happen."

The principle seems to be that, as the testator has entrusted him with the money without requiring a security, no person has authority to require it. Our conclusion is that the defendant having once paid the legacy to the first legatee for life, he is not now liable to pay it a second time to the plaintiff or to any person in remainder.

PER CURIAM. Reversed.

Cited: Hendrick v. Mayfield, 74 N. C., 632; *Ritch v. Morris,* 78 N. C., 383.

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(621)

WILSON & SHOBER v. THE BANK OF LEXINGTON, THE BANK OF GRAHAM, R. Y. McADEN and others.

1. In an action against a bank to recover the amount of certain bills issued as currency, it is not necessary to join as plaintiffs all persons holding bills of such bank; for being in the nature of a creditor's bill, such holders may at any time come in, be made parties, and share the recovery.

2. And when in such action relief is demanded against the individual stockholders as well as against the bank, such stockholders being represented by the bank, need not be made parties defendant.

3. Nor need such stockholders be made parties, although certain persons are individually sued in the same action, who had bound themselves to indemnify the stockholders against loss on account of the bills sued upon not being paid.

4. An action is well brought for the recovery of certain bills, when it is against the bank issuing the same, and against another bank which agreed to redeem the same, and also against certain individuals, who by written covenant agreed that the bills should be redeemed, and the individual stockholders saved from loss.

(*Carter v. Jones*, 40 N. C., 196; *York v. Landis*, 65 N. C., 535; *Jarrell v. Martin*, 70 N. C., 459; *Kennedy v. Pickens*, 38 N. C., 147; *Brinson v. Thomas*, 55 N. C., 414; and *Blalock v. Peake*, 56 N. C., 323, cited and approved).

ACTION to recover the amount of certain bank-bills, tried at the December (Special) Term, 1873, of GUILFORD, before *Henry, J.*, upon complaint and demurrer.

The following are substantially the only facts necessary to be stated as bearing upon the points decided at this stage of the case:

The Bank of Lexington was chartered by the Act of 1858-'59, ch. 68, to continue to 1 January, 1885, with power to establish a branch at Graham, in the county of Alamance: *Provided,* 1,000 shares of the stock was subscribed for at Graham. The requisite stock was subscribed at Graham, and a branch bank thereupon established, as provided (622) in the act of incorporation.

The stockholders were made, by the original charter, personally liable in double the amount of their original stock for the redemption of the bills of the bank, and other liabilities, in case of the insolvency or inability of the bank to redeem its notes or discharge those liabilities.

The parent bank (at Lexington) issued notes, some payable at Lexington, some at Graham; and of those payable on their face at Graham the plaintiffs own and hold $8,735.

The charter was amended in 1862 (Private Laws, 1862-'63, ch. 1), by which the branch at Graham was made an independant bank, and the stockholders at that place incorporated as a separate Bank of Graham, with power to carry on and continue the business of banking, *with the same power, immunities and restrictions in all respects and to all intents and purposes, as were or had been conferred on the Bank of Lexington;* and all the capital stock, bills, notes, evidences of debt, specie and all other effects belonging to the branch at Graham, was transferred to and constituted a part of the assets of the Bank of Graham, with a special restriction not to issue any bills of such new bank until after the war.

On the separation, the defendants, R. Y. McAden and others, stockholders before that time in the branch bank, and now in the Bank of Graham, covenanted to and with the Bank of Lexington that they would redeem all the bills payable at the branch at Graham, "as soon as practicable," and do so at and through the Bank of Graham, and forward the same to the Bank of Lexington; and that they further would indemnify and save harmless all the continuing stockholders

in the original Bank at Lexington from all loss for or on account of such bills.

The Bank of Lexington is insolvent and unable to pay its bills. The Bank of Graham is also insolvent.

The bills of the plaintiffs, and for which this action is brought, are a portion of those that the defendant McAden and others covenanted to redeem as soon as practicable, by their covenant of 7 March, 1863, before al- (623) luded to.

The burden of paying the bills, the plaintiffs allege, was originally in the Bank of Lexington and all the stockholders therein; and after the separation, the burden was on the Bank of Graham; and they both being insolvent, the plaintiffs claim the right to resort to the covenantors, McAden and others, between whom and the Bank of Lexington and the stockholders therein the burden, in justice and equity, ought to fall.

The defendants demurred to the complaint containing the foregoing facts, and for cause say:

1. That there is a defect of parties plaintiff in this, the plaintiff's action, for that it appears in said complaint that there are other creditors, holders of notes of the Bank of Lexington, payable at its branch at Graham, besides the plaintiffs, if they be such, who are entitled to their proportional share of satisfaction out of the assets of said bank, or from the other defendants, alleged to be liable for the same, if any be so adjudged in this case, and therefore should be joined as plaintiffs.

2. That there is a defect of parties defendant, for that none of the stockholders of the Bank of Lexington who are alleged to be liable by the charter for the debts of the bank, in case of insolvency or ultimate inability to pay, which is averred to be a fact in the complaint, are made parties defendant.

3. That it being alleged in the complaint that R. Y. McAden and the other defendants, who are sued as individual persons, among other undertakings bound themselves to indemnify and save harmless each and all the stockholders in the Bank of Lexington, against any loss, liability or obligation falling upon them, contracted at or by reason of said branch at Graham, each and all of said stockholders being necessary parties, either as plaintiffs or defendants.

4. That several causes of action have been improperly united in the same remedy; one against the Bank of Lexington, alleged to be for the recovery for notes of said bank held by the plaintiff—a claim which must be reduced to judgment before any other action or proceeding can be entertained to procure satisfaction; the second, being against the Bank of Graham, upon an alleged agreement between it and the Bank of Lexington, that it would take upon itself the redemption of the notes of the Bank of Lexington, payable on their face at the branch at Graham; and the third against R. Y. McAden and the other defendants, upon an alleged writing obligatory, executed by them to the Bank of Lexington, on 7 March, 1863, conditioned that they should as early as practicable redeem all the bills of the said bank, payable on their face at the former branch at Graham, and should indemnify and save harmless each and all of the stockholders of the Bank of Lexington against loss, liability or obligation, contracted at or by reason of the said branch at Graham; the parties in each of said alleged causes of action being different, and each of the latter being designed as supplemental proceedings to obtain satisfaction of a judgment expected to be obtained in the first.

(624)

5. That the complaint does not state facts sufficient to constitute a cause of action, in that it alleges no demand of payment on the Bank of Lexington at the said branch at Graham; and in that it does not allege that it has been practicable in the time which has elapsed since the contracting of the said obligation for the obligors to have redeemed the notes of the said Bank of Lexington payable at its branch at Graham.

Upon the hearing in the Court below, his Honor, after argument, sustained the demurrer, and dismissed the complaint.

From this judgment the plaintiffs appealed.

Dillard & Gilmer, for appellants.
W. A. and *J. W. Graham, contra.*

READE, J. We are of the opinion that none of the causes of demurrer are sufficient, because:

1. It is a creditor's bill, and all the creditors are or may come in and be parties, and share the recovery;

2. The Bank of Lexington represents its stockhold- (625) ers, who are secondarily liable;

3. For the same reason as in the second above;

4. The several causes are all connected and can be settled in the same action;

5. The demand was made, not of the branch Bank of Graham, it is true, for that had gone out of existence, but at and of the Bank of Graham, which had undertaken to redeem them; and a reasonable time had elapsed.

Upon overruling the demurrer and remanding the cause, we suppose the defendants will answer; and then the rights and liabilities of the parties can be better determined than they can now upon the demurrer. It would seem now, however, that the liability of the defendants under their covenant with the Bank of Lexington is to redeem the bills or to indemnify the Bank of Lexington if the Bank of Lexington should redeem them. It is equally plain that the Bank of Lexington is obliged to redeem its bills. But are the defendants bound under their covenant not only to the Bank of Lexington, but to the plaintiffs? It would seem that they are. It is a familiar principle of equity that the bill-holders are entitled to all the securities which have been provided for their redemption, the Bank of Lexington and all its assets. But the Bank of Lexington is insolvent. All its assets which went into the Bank of Graham are lost. The Bank of Graham is insolvent; and so the only thing left is the defendants' covenant. And in regard to that it would seem that the plaintiffs have an equity to be subrogated to the rights of the Bank of Lexington. What, then, are the rights of the Bank of Lexington? Evidently to recover of the defendants such amount as it has paid out in redeeming the bills which the defendants covenanted to redeem. The face value of the bills, if it paid the face value; otherwise, the sum actually paid. If the plaintiffs take the place of the Lexington Bank, then that is the measure of their rights, to be reimbursed the amount they paid out for the bills. That would probably be the measure if they received the bills as currency; much more would it be so if they were bought as a marketable (626) commodity, as all State bank bills have been since the war. *Carter v. Jones,* 40 N. C., 196; *York v. Landis,* 65

N. C., 535; *Jarrett v. Martin,* 70 N. C., 459; *Kennedy v. Pickens,* 38 N. C., 147; *Brinson v. Thomas,* 55 N. C., 414; *Blalock v. Peake,* 56 N. C., 323; Adams Eq., 269. There is error.

PER CURIAM. Demurrer overruled and cause remanded.

Cited: Long v. Bank, 81 N. C., 48; *Sinclair v. McBryde,* 88 N. C., 440.

R. W. GLENN and others v. THE FARMERS BANK OF NORTH CAROLINA and others.

In an action against an insolvent bank and the stockholders therein, on account of their individual liability, and also against certain trustees of the bank: *Held,* not to be error in the Judge below to overrule a demurrer, assigning as grounds the improper joinder of different causes of action.

ACTION, tried before *Henry, J.,* at December (Special) Term, 1874, of GUILFORD.

The facts necessary to an understanding of the case are set out in *Glenn v. Bank,* 70 N. C., 191.

The defendant demurred to the complaint, alleging:

1. That it is admitted in the complaint that the plaintiff has other actions pending in this Court, by appeal, and yet undetermined, against the defendant for the same cause of action.

2. That in the complaint several causes of action have been improperly united, namely: 1. An alleged right to recover against the Farmers Bank upon the notes sued on. 2. An alleged right, by way of supplementary proceeding, to annul and set aside a deed in trust, alleged to have been made by said bank to certain trustees, who have no interest in (627) the controversy, upon the alleged right of recovery aforesaid, in order to enforce satisfaction of the judgment, if one shall be obtained. 3. An alleged right, upon the affirmation that the said bank is insolvent, to recover against the individuals named as defendants, next after the said trustee, upon the allegation that they are severally liable in double the amount of their respective quotas of stock, to the satisfac-

tion of the demands of all the creditors of the bank, each one of which alleged rights is a separate cause of action.

3. That the complaint does not state facts sufficient to constitute a cause of action: 1. Against the said bank and trustees, because if the said deed was made as alleged, to hinder, delay or defraud creditors, it is void. 2. Against the alleged stockholders as individuals, because it does not aver that the insolvency of the bank has been ascertained by any legal method, or that the plaintiffs' demand has been reduced to a judgment against the bank.

4. That there is a defect of parties, both plaintiffs and defendants in this action, since no judgment can be rendered therein on the third alleged right of action, in article 2 of this demurrer, unless all the creditors and all the stockholders be parties to this action.

His Honor overruled the demurrer, whereupon the defendants appealed.

W. A. and *J. W. Graham,* for appellants.
Scott & Caldwell and *Dillard & Gilmer, contra.*

PEARSON, C. J. The plaintiffs' action is very complicated, both in respect to parties plaintiff and parties defendant, and also in regard to the causes of action against the bank and the causes of action against the stockholders. It remains to be seen whether he will be able to surmount all of the difficulties that lie in his way so as to reach the stockholders individually.

The charter makes the stockholders individually (628) liable in case of the insolvency of the bank. So assuming, as is admitted by the demurrer, that the bank is insolvent, the plaintiff has a good cause of action whereby to make the stockholders individually liable; and the question is, How must the plaintiff proceed to subject the stockholders? It would be a reproach to the administration of justice if the plaintiff has no mode of enforcing his right, and we will be reluctant to make an exception to the maxim, there is "no right without a remedy." We incline to the opinion that the very liberal mode of procedure adopted by C. C. P., in the sections referred to in the plaintiffs' brief, meets the difficulties raised by the demurrer, and without deciding the points definitely, but allowing the defendants to have the benefit thereof at the trial, in analogy to the equity practice, by which the plea is

overruled, but "the equity is reserved until the hearing," we have come to the conclusion that there is no error in the judgment of his Honor by which the demurrer is overruled and the defendants are required to answer.

PER CURIAM. Judgment affirmed.

Cited: Glenn v. Bank, 80 N. C., 97; *Bank v. Harris,* 84 N. C., 211; *Bronson v. Ins. Co.,* 85 N. C., 414; *Foster v. Hackett,* 112 N. C., 554; *Outland v. Outland,* 113 N. C., 75; *Fisher v. Trust Co.,* 138 N. C., 233.

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(629)

R. B. LONGMIRE v. H. C. HERNDON, exr.

1. If an answer to a bill in equity, filed before the adoption of the Code of Civil Procedure, be directly responsive to the material facts charged in the bill, and be clear, positive and precise in its denial of them, and be not disproved or discredited in this part by what is found in any other part of it, *it is evidence for the defendant.* But if the answer is defective in these requirements, and there is a replication, the rule does not apply.

2. A guardian who, on 20 December, 1862, collected on a well-secured *ante*-war guardian note, $3,000, and invested the same for the benefit of his ward in seven-thirty Confederate bonds, as he also did a large amount of his own funds, is not guilty of such laches as to render him liable for the amount.

(*Hughes v. Blackwell,* 59 N. C., 73; *Speight v. Speight,* 19 N. C., 280; *Thompson v. Mills,* 39 N. C., 390; *Woodall v. Privett,* 45 N. C., 198, cited and approved; and *Purser v. Simpson,* 65 N. C., 497; *Cummings v. Mebane,* 63 N. C., 315; *Shipp v. Hetrick, Ibid.,* 329; *Larkins v. Murphy,* 71 N. C., 560, and *Emmerson v. Mallett,* 61 N. C., 69, cited, distinguished and approved).

BILL IN EQUITY, filed in 1868, and heard before *Watts, J.,* upon exceptions to the report of the referee at the Spring Term, 1874, of GRANVILLE.

The original bill was filed by the plaintiff against D. C. Herndon, the testator of the defendant and the plaintiff's guardian, for an account and settlement of the guardianship. During the progress of the cause it was referred to a commissioner to state the account, which was done, both parties filing exceptions to certain items contained in his report.

The cause was then referred to J. J. Davis, Esq., who filed his report Spring Term, 1873, when the parties again filed exceptions. Upon the hearing his Honor sustained some of the exceptions and overruled others. From this ruling of his Honor both parties appealed.

All the exceptions, except two, were abandoned (630) upon the argument in this Court. These are fully set out, with the facts relating thereto, in the opinion of the Court.

Lanier, for the plaintiff.

Attorney-General Hargrove, W. A. Graham and *Busbee & Busbee,* for the defendant.

BYNUM, J. This is a suit in equity, instituted before the adoption of the present Constitution, which abolished the distinction between actions at law and suits in equity, and it is to be determined according to the principles and practice as they existed in the courts of equity.

The case is here by appeal from the rulings of the Court below, upon exceptions filed by the defendant to the report of the commissioner to take an account of the estate in the hands of the guardian. In this Court but two of the exceptions taken below are relied on or pressed by the counsel.

The first exception relied on is "that no credit is allowed the guardian for an investment in 'seven-thirty' Confederate bonds to the amount of $6,800 with moneys of the ward's estate, received in December, 1862, and February, 1863, and so invested soon thereafter." The only evidence to establish this alleged investment is the deposition of J. C. Taylor. His testimony is that in 1849 he executed a guardian bond to the defendant for the sum of $1,500, and that in December, 1862, paid on said note at his own request $2,000 in Confederate interest-bearing notes, and that in February, 1863, he paid the balance on said note, in Confederate money, which balance the report finds to have been $224. So there is a failure of proof as to the residue of the $6,800 investment, after deducting the sums paid by Taylor. But the defendant insists that his answer to the bill is evidence for him to establish the investment of the whole $6,800, because, he says that in a court of equity, when the answer is responsive to the direct allega-

tions and interrogatories of the bill, as to this particular investment, the rule is that the answer is evidence for (631) him, and that being uncontradicted, it must be taken as true. The true rule seems to be this: If an answer be directly responsive to the material facts charged in the bill, and be clear, positive and precise in its denial of them, and be not proved or discredited in this part by what is found in any other part of it, it is evidence for the defendant. But if the answer is defective in these requirements, and there is a replication, the rule does not apply. *Hughes v. Blackwell,* 59 N. C., 73; *Speight v. Speight,* 19 N. C., 280.

The answer to be received as evidence must not be drawn for the sole benefit of the defendant, but must disclose the truth and justice of the case, by setting forth, without any evasion or concealment, a full and fair discovery of all matters within his knowledge or in his power to discover; nor must it keep back information in his possession upon a material fact upon which the right to recover may depend. *Thompson v. Mills,* 39 N. C., 300. If the answer fails to meet these requirements, the plaintiff, by his replication, takes issue upon all the new matters of defense or avoidance alleged in the answer, and the defendant is put to the proof. *Woodall v. Privett,* 45 N. C., 199; *Lyerly v. Wheeler,* 38 N. C., 479.

Apply these principles to our case. The defendant seeks to discharge himself of this $6,800 investment, and it was material to the plaintiffs' equity to know the true character and source of this contested item, and to that end specific allegations and interrogatories were submitted to the defendant. Assuming that the door was thus opened for him to discharge himself by answer, he does not meet the occasion. The answer is clearly evasive, irresponsive and unsatisfactory, in this, that it omits to state the material facts within his own knowledge, that the money received by the defendant and invested in Confederate bonds was received in discharge of good ante-war bonds, and in the further fact that it states the amount paid by Taylor to have been at one time $4,000, and at another $1,600, when in truth it was $3,000 (632) at one time and $224 at another, as deposed to by Taylor and found by the referee. So in regard to the $1,200, which is a part of the said investment, the answer is

silent as to the source from which it was received, and whether upon an old or a Confederate debt. The answer, therefore, is wholly irresponsive and insufficient as to the true character of this much-contested investment, and in the particulars wherein the defendant had a certain personal knowledge. The answer, then, cannot be invoked in discharge or avoidance, as to the $6,800 investment, or any part thereof. The next position of the defendant is that if he is not discharged of the whole amount by his own answer, he is discharged as to a part of it, by the evidence of Taylor, who proves the payment of $3,000 in Confederate seven-thirty bonds, on 20 December, 1862. We must put out of the case the $224, the balance paid by Taylor two months later, in discharge of the guardian note, as that sum was paid in Confederate money, and there is no evidence outside of the answer which traces it into this $6,800 investment. The sole question, then, presented by this exception is whether a guardian who on 20 December, 1862, received in Confederate currency, $3,000 on a well-secured ante-war guardian note (when prudent business men in his county received such currency in discharge of old debts) and invested the money in "seven-thirty" Confederate bonds, for the benefit of the ward, which bonds afterwards became worthless by the result of the war, is to be held liable therefor. For the referee finds as a fact that at the time the guardian received these interest-bearing Confederate notes, prudent and good business men acted in the same way and received the money at par in discharge of all old debts. The evidence not only supports this finding, but also shows that the defendant invested largely of his own funds in the same way. In *Purser v. Simpson,* 65 N. C., 497, it was held to be *laches* in a guardian to collect a well-secured ante-war note in Confederate currency in September and October, 1863, when there was no need for its collection, and that after 4 July, 1863, no fiduciary agent ought to have collected such securities and invested in Confederate (633) bonds. In *Cummings v. Mebane,* 63 N. C., 315, it is held not to be imprudent in a guardian to receive Confederate money in December, 1862, from a debtor of his ward who was about to leave the State. And in *Shipp v. Hetrick,* 63 N. C., 329, the rule of diligence in such trustees is declared to be that of a prudent man in managing his own affairs. The

latest case decided in this Court is that of *Larkin v. Murphy,* 71 N. C., 360, where it is said: "We have found it impossible to lay down any rule to govern all cases as to the liability of administrators and other fiduciaries who received depreciated Confederate currency. The nearest we could come to it was to say that it might be received before 1863, and not after, and that 1863 was debatable ground. *Emmerson v. Mallett,* 61 N. C., 69. Every case must to a considerable extent be judged by its own surroundings."

In our case the guardian received the money in 1862; in doing so he acted as prudent men act in managing their own affairs, and as he acted in dealing with his own estate. He kept the bonds as the trust fund of his ward, because he could not safely invest otherwise, and there is no evidence of a want of integrity or good faith. It is unnecessary to advert to the anomalous political condition of the country at that time, or to the almost irresistible purpose, brought to bear upon all our citizens, to make Confederate money the universal currency of the country, to be received by all without doubt or hesitation.

This exception is sustained to the extent of $3,000.

The second exception relied on is that as the guardian made a tender of the Confederate bonds and other effects of the ward in March, 1865, which were not accepted, no interest should be charged against the defendant after that date.

We have just seen that the ward ought not to have received the bonds as tendered, as the larger part of them is chargeable to the defendant. If such a tender as the one alleged here was valid, it would be a short way to the settlement of complicated estates. This exception is disallowed. All the other exceptions are disallowed, except the one herein be-
(634) fore allowed in part. It will be referred to the Clerk of this Court to reform the report in conformity to this opinion, and a decree will be made according to the report as reformed. An allowance of $.... is made to the Clerk for reforming the report.

PER CURIAM. Judgment accordingly.

Cited: McNair v. Pope, 100 N. C., 408.

STATE OF NORTH CAROLINA v. THE RICHMOND AND DANVILLE RAILROAD CO., A. S. BUFORD, and others.*

The North Carolina Railroad Company is invested by its charter with full authority to lease its road, with power to the lessee to change the gauge thereof.

BYNUM, J., *dissenting.*

ACTION for an *injunction,* heard by *Albertson, J.,* at chambers, in WAKE, at Spring Term, 1875.

Attorney-General Hargrove, for and on behalf of the State, on 9 April, 1873, sued out a summons from Wake Superior Court, and at the same time filed a complaint, in which, among other things, it was alleged:

That on 11 September, 1871, the North Carolina Railroad Company, in which the State was interested as a large stockholder, leased its road, without authority of law, to the Richmond and Danville Railroad Company, and that the latter company, by its agents, officers, etc., has possession of the road; that such road is a public highway, and that the whole State is interested therein.

That the defendants, the Richmond and Danville (635) road and others, are about to change the gauge of the North Carolina road between the towns of Greensboro and Charlotte, so as to make it different from that of the other portions of the road; and that such change of gauge would greatly damage the whole State and its citizens, and is in no-wise warranted by law.

Wherefore plaintiff demands judgment, etc., and praying for a perpetual injunction.

Judge Watts granted the restraining order until the hearing, which was had before *Judge Albertson,* at Spring Term, 1873.

The defendants appeared and answered, insisting: that the State could not as a plaintiff maintain an action of this nature. That the North Carolina Railroad, by its charter, was authorized to lease its road and property, and that at the time of

*NOTE.—*Justice Rodman* did not sit in this case, by reason of his owning some shares of stock in the North Carolina Railroad Company.

making the lease complained of the State was represented in the meeting, by its directors, who sanctioned the same, as did also the directors representing the interest of the private stockholders.

The defendants further said that they did propose to change the gauge of the North Carolina road so as to make it harmonize with the tracks of the connecting roads, north and south of the places referred to in the complaint, insisting that such contemplated change would not endamage the State or any of its citizens, but, on the contrary, such change would greatly promote the State's interest, and facilitate travel and the transportation of freight from place to place.

Upon the hearing, the defendants moved to vacate the injunction theretofore granted, having given the necessary notice of such motion to the plaintiff.

His Honor refused the motion, and ordered the injunction to be continued until the hearing, upon the condition that the plaintiff enter into bond in the sum of $50,000, conditioned to pay the defendants all such costs and damages as they may incur by the wrongful suing out of this injunction.

From the order continuing the injunction the defendants appealed.

Badger and *Merrimon, Fuller & Ashe,* for appellants.
Attorney-General Hargrove and *Smith & Strong, contra.*

(636) SETTLE, J. On 11 September, 1871, the North Carolina Railroad Company leased its road to the Richmond and Danville Railroad Company for the term of thirty years, with leave to change the gauge of the said railroad track, upon condition that if the lessees did change the gauge they should change it back to what it is now at the termination of the said lease, if required to do so by the lessors.

This action involves the determination of two questions:

1. Is the lease valid?

2. Is there anything in the law or public policy of North Carolina which forbids a change of gauge?

We have had the benefit of able and elaborate arguments upon the questions presented, but I may remark here that most of the authorities cited have no application to the case at

bar, for the reason that the questions here involved are to be determined by a construction of the charter of the North Carolina Railroad Company and our general legislation on the subject of railroads. These questions necessarily depend upon our statutes, and of course cases determined upon other and different statutes can afford but little assistance in reaching a proper conclusion. In most instances they only tend to confuse. We admit the proposition, in its broadest sense, that the lease is void unless it be sanctioned by the legislation of both North Carolina and Virginia. The charter of the North Carolina Railroad Company is one of the most liberal ever granted in this State. We will not attempt to enumerate the privileges and powers conferred by it further than to say that the company was authorized to construct a railroad, with one or more tracks, without restriction as to gauge, and that they are expressly authorized, whenever they see fit, to farm out their right of transportation over said railroad; and the rights and duties of their leases are further recognized, defined and placed upon an equality with themselves, by enacting that said company and every person who may have received from them the right of transportation (637) of goods, wares and produce on the said railroad, shall be deemed and taken to be a common carrier as respects all goods, wares, produce and merchandise entrusted to them for transportation.

This is an express grant of power from the State to the company to lease their road whenever they see fit to do so, for we see no reason why a forced construction should be put upon the words "farm out" in order to divest them of their plain and obvious meaning, which is, in this connection, *to lease.*

Can any reason be suggested why the power to lease should not have been conferred upon the company, since by the general law of the State the whole road, with its franchise and all the rights and privileges thereof, together with all its corporate property, real and personal, might have been sold under execution for debt and conveyed by deed to the highest bidder? Rev. Code, ch. 26, sec. 9, *et seq.*

This legislation, taken in connection with the Act of 1871-'72, ch. 138, known as the free railroad law, under which railroads may be constructed anywhere in North Caro-

lina, and all roads, as well those already built as those to be constructed, are authorized to consolidate with other connecting roads, whether in or out of the State, shows conclusively that there is no policy in North Carolina which forbids the contract that has been entered into by these two companies.

It is conceded that the Legislature of Virginia has authorized the Richmond and Danville Railroad Company to take this lease by an act passed on 15 February, 1866, entitled "An act to authorize the Richmond and Danville Railroad Company to lease, hold and operate the Piedmont Railroad," and by an act amendatory of the above recited act, approved 11 July, 1870.

Since, then, the contract of lease is authorized by the legislation of both States, there is no foundation upon which the further objection that the Richmond and Danville Railroad Company is a foreign corporation can rest.

(638) There is no wall around North Carolina to exclude foreign corporations from entering the State and doing business here. On the contrary, it has been our policy to invite them in.

This is abundantly evidenced by the presence, for years in our midst, of almost every conceivable form of foreign corporations.

The rights of express, telegraph, insurance, mining, manufacturing and railroad companies, from other States, are daily recognized in our courts, and by our Legislature, which has heretofore welcomed them, not only as profitable sources of revenue, but more especially as useful agents in developing the wealth and resources of the State.

It appears from the exhibits in this action, and it is also a matter of history, that the Richmond and Danville Railroad Company has been, since 1866, without objection, controlling and operating the Piedmont Railroad, nearly all of which lies within the limits of the State.

Whatever may have once been thought of the policy of excluding foreign corporations, the increasing demands of commerce have liberalized our ideas on the subject, and taught us to open our doors to all persons, natural and artificial, who wish to engage in honest business. This spirit of liberality is called the comity of nations, and it generally keeps pace with the civilization of a State, being recognized where wealth and

intelligence characterize a people, and denied in barbarous countries.

Since the decision of the Supreme Court of the United States in *Bank v. Earle,* 13 Pet., 519, this comity of nations has been accepted, in its most liberal sense, by the States of this Union. In that case, *Taney, C. J.,* delivering the opinion of the Court, says: "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interest. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it as a part of the vol- (639) untary law of nations." And he quotes with approbation the following passage from Story's Conflict of Laws: "In the silence of any positive rule affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interest."

In the same opinion it is said "the intimate union of these States, as members of the same great political family, the deep and vital interests which bind them so closely togther, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity and friendship and kindness towards one another than we should be authorized to presume between foreign nations."

We now come to the consideration of the second question: Is there any law or policy in North Carolina which forbids a change of gauge? There is no restriction in the charter, as to gauge, but the company was left free to adopt such gauge as would best promote their interests. But it is said that as other roads have been required to adopt the gauge of the North Carolina Railroad, that company is not now at liberty to change its gauge. Freedom to adopt any gauge was the grant of the sovereign to the North Carolina Railroad Company. How can that grant be revoked or qualified by provisions in the charters of other roads with which the North Caro-

lina Railroad has no community of interests, and whose purposes may be antagonistic to her own?

It is certainly a novel idea that a charter without restriction is to be subjected to all the burdens of other charters with restrictions. If we may import this restriction into the free charter, what is to prevent us from importing all other restrictions, in all other charters, which some one may imagine is in furtherance of a public policy?

But what is to become of this supposed public policy under the operation of the free railroad law, which allows any other roads to connect with the North Carolina Railroad at
(640) any point and with any gauge they may see proper to adopt?

Our conclusion is, that the North Carolina Railroad Company not only had power, under their charter, to adopt originally such gauge as in their discretion would best promote their interest, but that if in the course of time another and a different gauge, either for the whole or only a portion of the road, should be thought more advantageous, they were left free to change it at pleasure. We have seen that the North Carolina Railroad Company have leased their road to another company with express permission to change the gauge if this other company shall see proper to do so. This confers upon the lessee all the rights in this respect which were possessed by the lessor.

And now the Richmond and Danville Railroad Company say that the demands of trade and travel require a change of gauge on that portion of the road lying between Greensboro and Charlotte, in consequence of the connections north and south of those points having a different gauge from that now in use on the North Carolina Railroad. Since the lease is valid, it is well that it clothes the lessee with large powers, such as to change shops, tracks, houses, etc., for it is to the interest of the public that a company undertaking to meet the responsibilities of a common carrier should not be trammeled and embarrassed by restrictions which would prevent them from properly executing their duties.

There was error in the order of injunction restraining the Richmond and Danville Railroad Company from changing the gauge of the North Carolina Railroad between Greensboro and Charlotte, and the same is hereby dissolved.

BYNUM, J. (*dissenting*). I cannot concur in the opinion of the Court, and as the principles involved in the decision are of great magnitude and consequence, I deem it my duty to give the reasons for my dissent.

The question presented is, Has the Richmond and Danville Railroad Company, a corporation created and existing by the laws of Virginia, under the claim of (641) lease made to it by the North Carolina Railroad Company, a corporation created and existing by the laws of North Carolina, the right to change the gauge of the latter road? The affirmative of this question is upon the defendant company which claims the right; it must, therefore, establish two propositions: first, that the right to change the gauge was vested in the North Carolina Company, and second, that it was capable of assignment to the defendant company, and was assigned to it.

I. It is not denied by the defendant that if the charter of the North Carolina road established a particular gauge, either in express terms or by necessary implication, then neither the road nor the defendant, its assignee, has the right to change it. But the defendant says that the charter of the North Carolina road contains no provision whatever as to gauge, and from this absence of any provision the defendant claims to derive all power, both to select a gauge and to change it at will. It is true that where a railroad charter prescribes no gauge, the company has the right to adopt one, because a track is essential to the purposes of its creation. But it does not follow that a company having once exercised the power and fixed a gauge, can change it at pleasure; because this is not essential to the purposes of its creation, and in the case before us is not alleged to be. For, says *Chief Justice Marshall,* "a corporation being a creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." 4 Wheat., 636.

A road may not, therefore, exercise all powers that are convenient or profitable to it, but only those that are essential, unless the powers are expressly conferred in the charter. But in this case it is not so much as alleged that the proposed change of gauge is even convenient to or desired by the people of this State, who own two-thirds of the road, and whose

supposed benefit was the consideration for the grant of the franchise. The defendant, then, upon whom the burden rests, utterly fails to show the right to alter the gauge, either (642) by the express provisions of the charter or by necessary implication. But shift the burden now from the defendant to the plaintiff, and without resorting to technical criticisms to ascertain the true powers of this corporation, it most clearly appears from its provisions that the gauge of the road is *fixed* in the charter.

The North Carolina Railroad Company was incorporated in 1849. At that time there were but two other railroads in the State, both of which were of the gauge of 4 feet 8½ inches, to-wit, the Wilmington and Weldon, and the Raleigh and Gaston, both leading to the Virginia line and there connecting with roads of that State of the same gauge, one leading to Norfolk and the other to Petersburg. I am not informed that there was at that time, in Virginia or north of that State, any road of a different gauge. In view of and in reference to all this, the Legislature of this State incorporated the "North Carolina Railroad Company." The first section of the act expressly provides "for effecting a railroad communication between the Wilmington and Weldon Railroad, where the same passes over Neuse River in the county of Wayne, and Charlotte." By sec. 52 it is provided as follows: "That the owners, proprietors, and authorities of the Raleigh and Gaston Railroad shall be and they are hereby authorized and empowered *to effect a junction and actual connection* with the said North Carolina Railroad at such point at or in the vicinity of Raleigh as they in their discretion may select." And by sec. 50 it is provided: "That one of the conditions of this charter is that this General Assembly shall have power to establish, regulate and control the intercourse between the North Carolina Railroad and the Raleigh and Gaston Railroad so as *best to secure an easy and convenient passage of persons and property.*"

These sections of the charter of the North Carolina road, so clear and unequivocal in meaning, seem to have been overlooked. They have and can have but one meaning. The corporators accepted the charter with these stipulations, which are made an essential part of the contract. It was im-

possible to comply with these conditions without mak- (643)
ing this road of the same gauge with the Raleigh and Gaston and the Wilmington and Weldon roads. All parties so understood it then, as shown by their contemporaneous action. The North Carolina road was constructed of the same gauge, and by the concurrent act of the three roads "the junctions" were formed, and the "actual connections" made, as they were expressly required to be by the charter. If the act of incorporation had contained the words, "The gauge of this road shall be 4 feet 8½ inches," the meaning would not have been plainer, or the duty of making the gauge more binding. What other reasonable construction can be put upon them? A railroad charter, as other instruments, is to be construed by looking at all its parts, and thus examined, to my mind it is impossible to say that the charter itself does not clearly fix the gauge of this road.

But if there could be any doubt as to this construction, arising out of any ambiguity in the charter, it is put to rest by the general legislation and policy of the State, which this Court must judicially notice for guidance in cases of doubt.

It has been urged that the State has no policy in respect to gauge, because two roads have been allowed to penetrate the State with a five-feet gauge. But such a deviation is no departure from, but is in harmony with a policy which allows the ingress of foreign corporations, even with their own tracks, provided they do not dismantle our own roads and system, constructed for the convenience of the people of this State in their territorial intercourse. Such considerations cannot affect an argument which is derived from the general scope of legislation as to the railroad system of the State, and more especially as to this road, which is the proposition before us.

There are many subjects upon which the policy of the several States is abundantly evident from the nature of their institutions and the general scope of their legislation, and which do not need the aid of a positive and special law to guide the decisions of the courts. Whenever the policy of a State is thus manifest, the courts of the United States would be bound to notice it, as a part of its code of (644)
laws, and to declare all contracts in the State repugnant to it to be illegal and void. *Bank v. Earle,* 13 Pet., 283.

Most of the railroad charters granted by the State *prior* to that of the North Carolina road, those granted *cotemporaneous* with the construction of this road, and those granted *since its* completion, in effect provide for or require a connection attainable only by a uniform gauge. At least three of the charters require that their gauge shall be 4 feet 8½ inches, and also that this gauge shall be the same as that of the North Carolina Railroad. Of these the Western North Carolina and the Atlantic and North Carolina not only prescribe the narrow gauge, but require a connection with the North Carolina road by which a continuous communication was to be effected from the Atlantic to the Tennessee line. It is true these latter charters were subsequent to that of the North Carolina road, but the policy of the State and the interests of this road were so identical that the North Carolina road accepted these provisions by making the required connections, and by their continuous use and enjoyment in common with the other two roads. Upon the faith of the assent of the North Carolina road, so given, these other roads were built and connected with it by the required gauge. If the owner of property who stands by and sees it exposed to sale without warning the purchaser is estopped from setting up title against him, much more is this road estopped from destroying valuable rights acquired, not by silent acquiescences, but by its voluntary and concurrent act in making the connections and allowing their use. So, whether we look to the charter by a fair construction, or to the general legislation, accepted and acted on by this road, or to the will of the people as expressed by building all the railroads of the State of the same gauge, whether prescribed in their charters or not, the conclusion seems irresistible that the State has a well-defined and understood railroad policy on the subject of gauge.

It has been objected that the State, through her di-
(645) rectors, assented to the lease and change of gauge, and is concluded thereby. But this is assuming as true the very thing that is denied, to-wit, that the directors were clothed by the charter with the powers they claimed to exercise. So, in receiving the rents of the lease the State is only taking her own, and is no more estopped than is a disseizee who receives from the disseizor the products of his own land, while asserting his title. So far from acquiescing in

the illegal act of the directors, the State is now in Court here, in her own sovereign right, demanding the protection of the Court against a violation of the charter.

No railroad scheme was ever devised by more of the wisdom and patriotism of the State. It was intended to be, in fact what it was in name, the *North Carolina* Railroad, from which, when completed, from the Atlantic to the Tennessee line, should radiate a uniform system of lateral roads, connecting all parts of the State in a common brotherhood, by an easy and convenient intercommunication of trade and travel. It is the first duty of nations to provide for the welfare of their own citizens; but no selfish purpose dictated this policy. This system was not circumscribed by State lines, but reached out to the border States and sought access to their markets by conforming this State gauge to theirs, and offering to them the same avenues and facilities of trade that we provided for ourselves.

Nor is the gauge of this State local or exceptional, but as it has been adopted by four-fifths of the railroads in the United States, it may be called properly the national gauge. Nor yet is it confined to this country. As early as 1845, a royal commission was appointed by the British Parliament to investigate the subject, which, in 1846, made an elaborate report, and concluded by recommending that the 4 feet 8½-inch gauge be declared by the Legislature to be used in all public railways then under construction or thereafter to be constructed; and they add that great commercial convenience would be obtained by reducing all the broad-gauge lines to the narrow-gauge, and that some equitable (646) means should be found for producing an entire uniformity of gauge, "owing," they pointedly say, "to the great evils of a break of gauge." Gillespie on Railroads, 287.

What Great Britain so earnestly sought, this State has had from the beginning, to-wit, a uniform system of roads of the most approved gauge, penetrating all parts of the State, embracing every railroad lying wholly in the State, and cementing the whole together by twelve hundred miles of connecting lines, over which commerce may pass without break of bulk or other hindrance.

In prosecuting this system, North Carolina has not only avoided the narrow and illiberal policy peculiar to barbarous

countries, and which is so justly deprecated in the opinion of this Court, but keeping pace with the most advanced ideas of commerce and civilization, and profiting by the experience of the enlightened nations, has adopted that system proved to be best when thoroughly tested, and always used where wealth and intelligence characterize a people. This State has no policy of excluding foreign corporations. Her doors are open to all persons, natural or artificial, who wish to engage in honest business, but upon the same terms she prescribes for her own citizens by her laws and public policy.

To me it is a startling proposition that a foreign corporation, having no legal existence here, except by courtesy, may come self-invited and break down her open doors, remove her landmarks and dismember a well-knit system of public improvements, the steady growth of half a century. And the spirit of liberality which submits to this is called "the comity of nations."

The immediate evils which will result to the State from this measure are of the greatest magnitude. Now there is an unbroken connection between all the railroads of the State, and all freights have speedy access to every market of the State without change of car. By the proposed change, the eastern part of the State is severed from the west as
(647) it were by a wall or partition, excluding both from the equal benefits of the roads, and forcing the commerce of the State to do one of two things: either to adopt the Richmond and Danville route, or to submit to an onerous tax for the privilege of trading in the markets of the State. If the Legislature of the State should impose a tax of five per cent. upon all produce transported over the roads to any market of the State east or west of this bisecting wall, but allow it over this road exempt from taxation, it would present the practical effect of this break of gauge. This new burden will be the sum of the expense, delay and risk of breaking bulk, once certainly, and often twice, *to reach a home market.* When it is considered that each break of bulk is computed to be equal to fifty miles of transportation, and when it is further considered how delicate are the laws of trade and that even a slight increase of cost or delay of carriage will often turn the whole current of trade into new channels, the evils and costly results of this disruption can be seen, and the wisdom

of the State in fixing and, up to this time, adhering to a public policy, is justified.

That the whole railroad system of this nation is tending to a uniformity of gauge, which is demanded alike by public opinion and the interest of commerce, is certain. What that gauge shall be has already been determined by the same inflexible laws. No step backward, whether dictated by the illiberal rivalries of States or corporations, can long impede or denationalize a universal necessity and a universal desire.

2. But is the lease itself valid? To make it valid requires the concurrence of two powers: 1st, the power of the lessor company to make, and 2d, the power of the lessee company to take this lease. In discussing corporate powers, we are to keep steadily before us their nature and faculties, to-wit, "that a corporation is precisely what the incorporating act has made it, derives all its powers from that act, and is capable of exerting its faculties only in the manner which that act authorizes. 2 Cr., 127. It is clear, and not denied, that the power to lease is not one of the powers incidental to the existence of this corporation, and that it must (648) be an express power conferred in the charter itself.

The defendant, however, claims that this express power to lease is found in sec. 19 of the charter, which is as follows: Sec. 19. "That the said company may, when they see fit, farm out their right of transportation over said railroad, subject to the rules above mentioned," etc. In the opinion of the Court it is held that the power to farm out the right of transportation *over* a road is the power to lease the road itself, and under this limited and specific grant, that the company can, in the words of the deed of lease, "demise, let, hire and farm out the entire railroad with all its franchises, rights of transportation, works and property, including its superstructure, road-bed and right-of-way, depot houses, shops, buildings, fixtures, engines, cars, and all franchises belonging thereto." To me this appears to be an immense structure erected upon a slender foundation, and needs at least a single decision or authority to maintain it. A right of transportation *over* a road is one thing, and the road itself with its engines, shops and property is certainly another, and these can no more be confounded than rent can be with the land out of which it issues. One is a right of passage over the *corpus,* the other is the *corpus*

itself. A lease of the road would carry the right of transportation as an incident; but the right of transportation would not carry the road, for if so every wagoner at a toll-gate, who buys a ticket over a turnpike for a year or a term of years, thereby acquires a lease of the road and its management. Nothing is more common than for all roads, with connecting lines, to farm out the right of transportation over their lines, and in this day of close connections and rapid transit, the practice is indispensable to successful business. We, every day, see this right farmed out to express companies, and by one company for the cars and freight of another, and for special purposes. At many of our depots we see freight cars painted and marked the "Yellow line," the "Green line," the "Blue line." What does it all mean? These cars belong to vast incorporated companies of these names which (649) are doing nearly all the fast transportation of the United States; yet they do not, as I am informed, own a mile of railroad. Their business is to furnish cars and freight which they agree to deliver. In order to do so, they hire or farm from the railroad companies the right of transportation over their lines at stipulated rates and speed. One company furnishes the road and motive power and farms out the right of transportation to the other company, which supplies the rolling stock and delivers the freight.

Our ideas of a corporation, its privileges and disabilities, are derived from the English books, and we recur to them for aid in ascertaining its character. 5 Cr., 87. How the term "farm out the right of transportation" came to be inserted in railway charters, and its proper construction, are seen by sketching the progress of this species of internal improvement. Railways, except as operated by steam, are not of recent origin, but have been in use for over two hundred years. Wooden railways were employed as a substitute for common roads among the mines of England and Wales, as early as 1650. Subsequently the rails were covered with plates of iron, and the rails were made wholly of iron as early as 1767. The first successful locomotive was constructed in 1814; but it was not until so recently as 1829 that steam was applied with decided success. The rapid progress of railroads since that date is well illustrated by an extract from two works:

"Nothing can do more harm to the adoption of railroads than the promulgation of such nonsense as that we shall see locomotive engines traveling at the rate of 12, 16, 18 and 20 miles an hour." Wood on Railways (1825).

"An express train on the Great Western Railway drawing 59 tons has traveled for three hours at the rate of 63 miles an hour." Ritchie on Railways (1846). Since then 75 miles an hour has been attained.

For a long period and until the recent application of steam, railways were extensively used for transportation in the mining regions of England. Horses were the motive power; corporations were formed then as now, which (650) sometimes employed their own cars and power and often made it their business to furnish the road-bed and franchise, and to farm out the right of transportation over the road to the individuals and companies operating the collieries and other mines, who furnished their own vehicles and horses. Thus the railroad company would often farm the right of transportation to several companies. In order to do this business, the charters of these railroad companies had inserted in them this power to farm out the right of transportation over their roads. When steam was introduced this practice of farming out did not cease and the clause was still retained in the charters, and even now by a general law, 8 Victoria, ch. 20, sec. 87, the power is secured to all companies to contract with other companies for the right of transportation over their track. 1 Redf. R. R., 587, 447.

It is thus seen that this common *formula,* derived from the English charters and inserted in most of the railway charters of this State, following these more ancient forms, was applicable to a different purpose altogether from a lease of the road itself.

If we turn from railways to mines and manufactures, we still find that the right to lease, as claimed here, can be based upon no such *formula.* In California and Colorado, for instance, nothing is more common than for companies to make it a business to acquire water-power and farm out its use to mining companies. So mills and factories are supplied with water to operate the machinery, and gas and water furnished to cities, hotels and stores. No one would conceive that such contracts could transfer the gas and water-works

and all control over them. Such contracts may be called "leases," and so may the powers to farm out the right of transportation over a road when exercised; but strip off the disguise of names, and the distinction between the two propositions is as clear and well-defined as the difference between the substance and the shadow. No authority or decision is cited to sustain this lease, and we may fairly conclude that the judgment here is without a precedent. Such a con-
(651) struction could not have been in the minds of the corporators and the Legislature, and it is capable of the most dangerous abuse. Under the cover of a few ambiguous words, used for a different purpose, almost every road in North Carolina may be at once transferred with all their belongings to English or German companies; and we may soon enjoy the consolation of travel on the *London and Liverpool* or the *Berlin and Amsterdam* grand trunk railway—*North Carolina division.*

But it is asked, why may not a railroad lease out to another company, when by the provisions of Revised Code, ch. 26, sec. 9, it may be sold to the highest bidder under execution? Admit that it can be sold under execution, and it does not show or tend to show that the State has no State policy, which is the purpose of the question; because the act cited authorizes a sale for debt only, and therefore when there is no debt there is no power of sale. Even without this statute, at common law, corporate property, like that of an individual, is liable to be sold for debt. If this were not so, a great wrong would be done under the sanction of law. So I apprehend, without express power in the charter, a railroad corporation, in order to secure its completion, may mortgage the road for the funds necessary to complete it, because without its completion the very purpose of its creation would be defeated, and a mortgage is the necessary and usual method of obtaining the money. Such a mortgage, like the sale under execution, is considered as involuntary, and therefore they do not affect the question of public policy.

But it is perfectly clear, that without a power to that effect in the charter, a railroad company can neither make a voluntary sale, lease or mortgage any more than it can bank, insure or deal in stocks; because a corporation is an artificial being, having those powers only which are expressly conferred upon

it, or which are incidental to its existence; and to sell, lease, mortgage, etc., constitute no part of the object of its creation. The power to lease, therefore, being foreign to the object of the creation of the corporation, must be shown by an express and unequivocal grant in the charter. "For," (652) said the Court in the *Binghampton case,* 3 Wall, 51, "charters are to be construed most favorably to the State, and in all grants by the public nothing passes by implication. All rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If on a fair reading of the instrument a reasonable doubt arises as to the proper interpretation to be given to it, the doubt is to be solved in favor of the State; and where it is susceptible of two meanings, one restricting and the other extending the power of the corporation, that construction is to be adopted which works least harm to the State."

The laws of a country have no binding force beyond its territorial limits, and their authority is admitted in other States not *proprio vigore,* but *ex comitate,* and every State will judge for itself how far this comity is to be permitted to interfere with its domestic interest and policy. 2 Kent, 457. Every power which a corporation exercises in another State depends for its validity upon the laws of the sovereignty in which it is exercised, and it can make no valid contract without its sanction. Therefore, it is not sufficient to find in the charter an express power even to lease and transfer the road with all its franchises, but if the lessee is a foreign corporation, the further power must be shown in the charter to lease and transfer the road to such corporation. The true rule, and its application to the case before us, appear to be this: When a corporation created in one State goes into another to make contracts and do business, the comity of States will permit it to do so where it appears that the contract or business is such as is usual and incidental to the very purpose of its creation; *but it can do no other.*

Hence, all foreign insurance, express, bank and other corporations may, by this comity, make and enforce in this State all such contracts as are entered into in the ordinary and regular business for which they were created, and no other.

But the power in one railroad company to lease and
(653) operate other railroads is not a usual or necessary power, and therefore the comity of States does not apply, but an express grant of power from this State must be shown before such corporation can lease and operate a railroad here. If the Legislature of Connecticut should pass an act authorizing the Hartford Insurance Company to lease a railroad of North Carolina, this Court could not hold a lease, made under such a power, to be valid by the comity of States. Why? Because that would be not a natural but an exotic power, as it were, interpolated in the charter, and the duty of self-protection and respect would absolve the State from the obligations of comity.

Long after the defendant road was incorporated and built, the Legislature of Virginia passed an act authorizing that company to lease other roads. The power thus given was no part of the essential or usual attributes of that or any other railroad corporation, and though valid in the jurisdiction of Virginia, it cannot be enforced here. Comity in such case is out of the question. Express legislation is necessary. Such I understand to be the doctrine long established in the leading case of *Bank v. Earle,* 13 Pet., 283. There the bank had been incorporated and existed in Georgia, and through an agent had made a loan in Alabama, upon which an action had been brought in the latter State. The defendant denied the power of the bank to make and enforce contracts in Alabama. The Court held the contract to be valid and enforcible in the courts of Alabama, but upon the ground that the bank in making the contract sued on was pursuing the usual and legitimate business of banking, the purpose for which it was created, and that in such cases, by the comity of States, the contract was valid and would be enforced in Alabama, it not appearing to be against her laws of public policy.

But it is against the policy of nations to allow one company to transfer its powers to another corporation, even in the same State, and it has been so expressly decided in the English courts. 9 Hare, 306; 12 Eng. L. & E., 244. And
(654) so again the very point before us has been decided by the highest authority, 19 Eng. L. & E., 513, in which it is held that where one railway leased its entire use

to another company the lease was illegal as against public policy, unless it had been expressly authorized by act of Legislature. Much more does public policy forbid such a lease to a foreign corporation.

Public law so well settled and recognized at home and abroad, should not be overthrown by the mere *construction* of words in a charter, of ambiguous and doubtful meaning; but on the contrary, should control their construction, according to every rule of interpretation. It would be monstrous if the courtesy of this State, or anything short of express and positive legislation, could be successfully invoked to validate the purchase of our railroads by any foreign adventurer who chooses to go into the market, and who may inaugurate a management and policy utterly subversive of the interests and institutions of the State, and the very purposes for which these corporations were created. For it is certain that if this road and franchise can be transferred to the defendant without express legislation, it and all other roads of the State with like charters can be transferred to Turkey or Egypt as well, and their interests and policy control them, however unfriendly to our own.

The rapid multiplication of these bodies, their resources and far-reaching ambition, their ubiquity and vast combination, all moved and directed by concentrated power and talent, constitute them a distinct and almost independent and overshadowing power in our governments, and in fact the great social and political problem of the age. Whether they shall control governments or governments shall control them, are questions that are forcing themselves upon public attention and fast assuming practical importance. They should and will be maintained in the exercise of all their essential and legitimate powers as necessary and useful institutions of modern civilization. But if in addition to the dangerous power of transferring all their property and franchises to anybody and anywhere, it should also be held that their corporate powers are such contracts as put them beyond the reach of all legislative check or control in the interest of society, (655) then the problem will have been solved. The government, in my opinion, will have abdicated its sovereignty, heretofore supposed to be inalienable, and society will be left without protection to chartered irresponsibility.

Whether the power of legislation has not been expressly reserved to the State in sections 50 and 52 of the North Carolina road is a question not now before us for discussion.

My conclusion upon the whole case is, that the North Carolina Railroad Company had no right to change the gauge and its assignee acquired no right to change it; and further, that the lease is *ultra vires* and void. For although the right of transportation over the road is the subject of lease, the lease as made cannot be good in part and bad in part, because it is impossible to separate the good from the bad and to apportion a rent given *in solido*. I, therefore, think the judgment of the Court below should have been affirmed.

PER CURIAM. Injunction dissolved.

Cited: R. R. v. R. R., 83 N. C., 489; *Logan v. R. R.,* 116 N. C., 945; *Harden v. R. R.,* 129 N. C., 356, 358; *Land Co. v. Hotel,* 132 N. C., 533.

INDEX.

ABATEMENT.

No action shall abate by the death of a party if the cause of action survive or continue. *Shields v. Lawrence*, 43.

ACCOUNT.

In a mutual running account between a commission merchant and his customer, where neither party makes any specific application of certain cotton shipped by the customer in payment of advances made by the merchant: *Held*, that the cotton so shipped was to be applied in payment of the items of the merchant's account as they were respectively made; *e. g.*, the first item on the debit side is discharged or reduced by the first item on the credit side. *Jenkins v. Smith*, 296.

See "Evidence," 11; "Supreme Court," 2; "Counter-claim."

ACTIONS.

1. An action brought to foreclose a mortgage upon a tract of land cannot be joined with an action to recover the possession of another tract of land—causes not arising out of the same transaction or transactions connected with the same subject of action. *Edgerton v. Powell*, 64.

2. Several causes of action may be joined in one complaint, *provided* all of them arise out of any one of the classes specified in the C. C. P., *e. g.*, "126(2) contracts expressed or implied." *Sutton v. McMillan*, 102.

3. An action to try the right of an incumbent to any public office may be brought by the Attorney-General upon his own information, or upon the complaint of any private party. *Attorney-General v. Hilliard*, 163.

4. Whenever a person is compelled to pay a public officer, in order to induce him to do his duty, fees which he had no right to claim, they can be recovered back. *Robinson v. Ezzell*, 231.

5. In an action against a bank to recover the amount of certain bills issued as currency, it is not necessary to join as plaintiffs all persons holding bills of such bank; for being in the nature of a creditor's bill, such holders may at any time come in, be made parties, and share the recovery. *Wilson v. Bank*, 621.

6. And when in such action relief is demanded against the individual stockholders as well as against the bank, such stockholders being represented by the bank, need not be made parties defendant. *Ibid.*

7. Nor need such stockholders be made parties, although certain parties are individually sued in the same action, who had bound themselves to indemnify the stockholders against loss on account of the bills sued upon not being paid. *Ibid.*

8. An action is well brought for the recovery of certain bills when it is against the bank issuing the same, and against an-

ACTIONS—*Continued.*

other bank which agreed to redeem the same, and also against certain individuals who by written covenant agreed that the bills should be redeemed, and the individual stockholders saved from loss. *Ibid.*

9. In an action against an insolvent bank and the stockholders therein, on account of their individual liability, and also against certain trustees of the bank: *Held*, not to be error in the Judge below to overrule a demurrer, assigning as grounds the improper joinder of different causes of action. *Glenn v. Bank*, 626.

See "Abatement," 1; "Agent," 1; "Consideration"; "Counterclaim," 1; "Executors and Administrators," 10; "Feme Covert," 3; "Infant," 4; "Injunction," 1, 5; "Municipal Corporations"; "Practice," 2; "Statute of Limitations," 2, 3.

ADMINISTRATOR DE BONIS NON.

See "Executors and Administrators," 8, 9.

ADULTERY.

See "Divorce."

ADVANCEMENTS.

A father made advancements to four of his children to the value of $1,200 each; to four others he advanced nothing. Those to whom he had made advancements were also his sureties, and he was otherwise indebted to them. To pay his debts, and save his sureties from loss, he conveyed all his property in trust; the sureties, his creditor children, at the same time covenanting with the others that in case the property was insufficient to pay the debts of the father, and also to make those who had received nothing, equal to themselves, that they would apportion the advancements they had received so as to make all the children of their father equal: *It was held*, that the proper construction of this covenant was, that if the father, on the close of the trust, should owe the creditor children more than the amount of their respective advancements, they should pay back nothing; but if he owed them less than their advancements, the difference (being the true debt due to the father) was to be so apportioned as to make all equal. *Bason v. Harden*, 281.

See "Landlord and Tenant," 4.

AFFIDAVIT.

See "Attachment," 3; "Executors and Administrators," 3; "Practice," 4, 5.

AGENT.

1. P contracts with K as follows: "And I further agree that in the event that I shall not sell any of the goods, etc., shipped and delivered to me by the said K, that I will not make any charge thereon, and that I will hold the same as his property and as his agent aforesaid, subject to his order, and to be disposed of in any manner that the said K shall direct": *Held*,

AGENT—*Continued.*

that P had no estate in the goods whatever, and that an action for their conversion was properly brought by K. *Kerchner v. Reilly*, 171.

2. Where one who sold goods on his own account failed, and afterwards sells goods at the same place as agent for another, it is proper that he should in some way notify the public of the change in the nature of his business: *It may be*, that if no such notice is given, a person who ignorantly gives credit to the agent in the belief that he is acting upon his own account, would be entitled to set up such a defense against the principal. Such notice need not be necessarily given by publication in the newspapers; any equivalent manner of making the same public will suffice. *Ibid.*

3. An agency to receive certain articles of personal property is no evidence of an agency to dispense with the delivery of such articles. *Boyett v. Braswell*, 260.

See "Evidence"; "Specific Performance," 2.

4. Where a defendant agrees to deliver certain goods, with a proviso that the agreement shall be void in either of two events; such condition is a subsequent one, and on the trial it was incumbent on the defendant to show that at least one of the events, which was to avoid the agreement, had occurred. *Speer v. Cowles*, 265.

See "Landlord and Tenant," 3; "Appeal," 7; "Attachment," 2; "Specific Performance," 2.

ALLOWANCE.

See "Probate Court," 6.

AMENDMENT.

1. It would be a serious obstruction to the administration of justice if transcripts sent from one court to another, sometimes loosely made up, could not be amended by the original records. The courts have authority so to amend, in order to make such transcript conform to the original record. *State v. Buckley*, 388.

2. When an amendment lies within the discretion of the presiding Judge of the Superior Court, this Court will not review the exercise of that discretion. *Lippard v. Roseman*, 427.

See "Probate Courts," 3, 4; "Bastardy," 1; "Deed," 1; "Practice," 2.

ANSWER.

See "Evidence," 13; "Pleading," 2; "Superior Courts," 2.

APPEAL.

1. An appellant, if not allowed by the Court to appeal without security, must file his appeal bond at the term at which the case was tried, or the appeal will be dismissed. *State v. Hawkins*, 180.

2. From a general verdict of "not guilty" in the Court below, no appeal lies to this Court. *State v. Armstrong*, 193.

APPEAL—*Continued.*

3. An appeal to the Supreme Court will be dismissed when the defendant files no appeal bond, and there is no order allowing him to appeal without, granted upon the usual affidavits of inability, etc. *State v. Patrick*, 217.

4. An appeal by a railroad company (the defendant) from the assessment of damages by commissioners appointed in pursuance of its charter, brings up the whole case into the Superior Court, where the parties can have every right relating to such damages adjusted and determined. *Phifer v. Railroad*, 433.

5. *Therefore*, a special action involving the same rights will be dismissed with costs. *Ibid.*

6. When a Judge below refuses to give a judgment prayed for (except in the case of his refusal to grant an injunction), no appeal lies to this Court. *Maxwell v. Caldwell*, 459.

7. Within certain limits the parties may, by consent, waive the time of complying with the rules for perfecting an appeal, and the Supreme Court will respect such agreements between counsel if they appear upon the record. If such agreement does not appear, the Supreme Court will adhere to and enforce the rules prescribed in the Code of Civil Procedure. *Wade v. New Bern*, 498.

8. Where, upon a trial in the Court below, the plaintiff asked for a new trial, and upon its being refused appealed to this Court, and at the same time the defendant appealed; and in this Court the judgment of the Court below was affirmed dismissing the plaintiff's action; in such case the appeal of the defendant to this Court will be dismissed with costs. *Horne v. Horne*, 534.

See "Justices of the Peace," 3; "Practice," 6, 8, 9, 10.

APPEAL BOND.

See "Appeal," 3.

APPRAISERS.

See "Homestead," 4.

ARREST.

A citizen of another State, voluntarily attending one of our Superior Courts as a witness, is privileged from arrest in civil cases, although no subpœna has been served on him. *Ballinger v. Elliott*, 596.

ASSAULT AND BATTERY.

See "Justices of the Peace," 4, 5.

ASSENT.

See "Feme Covert," 1, 2.

ASSETS.

See "Executors and Administrators," 2, 5.

ASSIGNEE.

See "Bankruptcy," 1; "Landlord and Tenant," 2, 4.

ASSIGNMENT.

A debt may be verbally assigned; and the assignment, if made for a valuable consideration, will hold good against the lien of an attachment subsequently obtained. *Ponton v. Griffin*, 362.

ATTACHMENT.

1. Where a plaintiff in an attachment recovered judgment against the defendant therein for the amount of his debt, and at the same term a judgment was rendered on the replevy bond of the defendant, which was subsequently stricken out: *Held*, that striking out the judgment on the replevy bond did not disturb or vacate the first judgment against the defendant in the attachment. *Logan v. Wilkins*, 49.

2. A plaintiff in an attachment levied on the property of the debtor, accepting a deed of trust from such debtor to all his creditors, and signing an agreement providing for the payment of the debts of the debtor *pro rata*, releases the lien acquired by the levy of the attachment, and must take his part with the creditors secured in the deed. *Rahity v. Stringfellow*, 328.

3. When the defendant in attachment moves to vacate the same for causes appearing in his affidavit, it is not necessary to serve the plaintiff with a copy of such affidavit before the motion is heard. *Palmer v. Bosher*, 371.

See "Assignment," 2.

ATTORNEY-GENERAL.

See "Actions," 3.

AUDITOR.

See "Mandamus," 1, 2, 3.

BAIL.

See "Executors and Administrators," 3.

BANKRUPTCY.

1. A person who borrows of another personal property, cannot avoid returning the same, or paying for it, by alleging that since he borrowed the property the owner has gone into bankruptcy, and the property belongs to his assignee. *Lain v. Gaither*, 234.

2. Where A made a general deposit of a sum of money with B, and afterwards brought an action against him to recover the money, to which B pleaded his discharge in bankruptcy: *Held*, that such deposit did not come within the exception preventing a discharge, embraced in sec. 33 of the Bankrupt Act. *Harvey v. Devereux*, 463.

See "Landlord and Tenant," 2; "Evidence," 5.

BANKS.

See "Action," 5, 6, 7, 8.

BASTARDY.

1. Proceedings in bastardy are not *quasi*-criminal; and the record of such proceedings may be amended in the Superior Court, as are records in other civil cases amended. *Hicks v. Higgins*, 226.

2. Depositions are admissible in evidence on the trial of an issue in bastardy, as they are in other civil cases. *Tidline v. Hickerson*, 421.

BATTLE'S REVISAL.

See "Sheriffs," 2.

BEST IMPRESSIONS.

See "Evidence," 4.

BILLS, NOTES, ETC.

1. A note given for the balance of the purchase money at an execution sale, to the legal representative of the execution debtor, stands upon the same footing as other notes due without condition, and no demand for the payment of the same is necessary before suit. *Love v. Johnston*, 415.

2. Before an action can be sustained against an indorser of a draft it must appear that the same has been presented to the drawee for acceptance or payment, and that due notice has been given to the endorser of its non-acceptance or non-payment. *Long v. Stephenson*, 569.

See "Evidence," 2; "Legislative Scale."

BILL OF REVIEW.

See "Sale of Land for Partition."

BORROWED MONEY.

See "County Commissioners," 1.

BOUNDARY.

See "Judge's Charge," 1.

BURGLARY.

1. It is error on a trial for burglary for his Honor to charge the jury that if they believed "from the evidence that the prisoner was in possession of the watch and chain in Danville, on the Monday after the same had been stolen on the previous Saturday night in Greensboro, the law presumed that he was the thief, and that the prisoner was bound to explain satisfactorily how he came by the stolen goods." *State v. Graves*, 482.

2. The rule is, where goods are stolen and found in possession so soon thereafter that he could not reasonably have got the possession unless he had stolen them himself, the law presumes he was the thief. *Ibid.*

BURGLARY—*Continued.*

3. A storehouse which is used as a regular sleeping apartment, although so used for the sole purpose of protecting the premises, is a dwelling-house, in which burglary may be committed. *State v. Outlaw*, 598.

4. In an indictment for burglary, where the house alleged to have been broken into was a dwelling-house belonging to A, though occupied by one of his employees: *Held*, that charging in the indictment the house as "the dwelling-house of A," instead of "a dwelling-house of A," etc., is not such an inaccuracy as to vitiate the indictment. *Ibid.*

5. It is settled that if the servant, clerk or employee, occupy the house broken into, but have no estate therein as lessee, or tenant at will, or a tenant at sufferance, it should be charged to be the dwelling-house of the owner. *Ibid.*

CARDING MACHINE.

See "Fixtures"; "Mortgage," 1.

CHATTELS.

Fructus industriales are chattels; and a conveyance of one's "entire crop of corn," whether growing or unplanted, is a chattel mortgage. *Robinson v. Ezzell*, 231.

See "Legacy."

COMMISSIONS.

See "Executors and Administrators," 10; "Probate Court," 7.

COMMON CARRIER.

Where the plaintiff contracted with the defendant, a common carrier, for the transportation of a number of horses, and the horses were placed in the defendant's cars, whose agent ordered a servant to lock the cars, and the servant was prevented from doing so by the agent of the plaintiff, and on the passage some of the horses were lost: *Held*, that the defendant was guilty of no negligence in failing to lock the door, and was not liable for the loss of the horses. *Lee v. Railroad*, 236.

COMPENSATION.

See "Sheriffs," 4.

COMPLAINT.

1. It is error to dismiss a complaint because the defendants are summoned to answer the complaint of A and B alone, and the complaint is in the name of A and B and others. *Wilson v. Moore*, 538.

2. Where the summons is to A and B in their individual capacity, and also as executors, and the complaint is against them as individuals and executors, and also as agents or trustees as well as stockholders, etc., it is error to dismiss the complaint. *Ibid.*

COMPLAINT—*Continued.*

3. Where a summons concludes with a demand of the relief demanded in the complaint, and the complaint shows a cause of action arising out of contract for the recovery of money only, and demands judgment for a specific sum, and for such other and further relief, etc., the complaint should not be dismissed. *Ibid.*

See "Action," 2; "Pleading," 1; "Practice," 2; "Superior Courts," 3.

CONDITION.

See "Agreement," 4.

CONDONATION.

See "Divorce," 2.

CONFEDERATE MONEY.

See "Executors and Administrators," 6, 7; "Guardian and Ward," 3; "Payment," 2; "Tender."

CONFESSIONS.

See "Evidence," 8.

CONSIDERATION.

When the consideration for a promise to pay is property purchased by the debtor during the war, the vendor is entitled to recover the value of such property at the date of the sale in gold, or its equivalent in the legal tender of the United States. *Wimbish v. Miller*, 523.

See "Contract," 1.

CONSTITUTION.

1. The amendment to the Constitution, Art. IX, sec. 13, adopted by the General Assembly February, 1873, was adopted and ratified by the people in accordance with the provisions of the Constitution, Art. XIII, sec. —, and is a part thereof. *University v. McIver*, 76.

2. The Act of 1873-'74, ch. 64, providing for the election of trustees of the University was passed in accordance with the provisions of the Constitution, and the trustees elected under that act were properly elected. *Ibid.*

3. Sec. 7 of Art. VII of the Constitution of the State prohibits any county, city, town or other municipal corporation from contracting any debt, etc., without the affirmative consent of a majority of the people of the county who are qualified to vote. *Railroad v. Commissioners*, 486.

4. And the Act of 1869-'70, ch. 9, being an attempt to evade the restriction which the Constitution has put on counties, etc., to contract debt, is unconstitutional and void. *Ibid.*

See "Fraud"; "Homestead," 6, 11; "Judges of the Superior Court," 1, 3; "Month"; "Municipal Corporations," 3.

CONTINGENT REMAINDER.

A contingent remainder is not subject to execution for the payment of a debt before the falling in of a particular estate. *Watson v. Dodd*, 240.

CONTRACT.

1. A contract to convey land, in consideration that one of the parties should serve in the Confederate army as a substitute during the war, was in aid of the rebellion, and as such, against public policy, and cannot be enforced. *Lance v. Hunter*, 178.

2. Before a plaintiff can recover in an action for an alleged breach of contract he must show either that he has complied with the contract or has been relieved from complying by the conduct of the defendant. *Boyett v. Braswell*, 260.

3. Where a defendant relies upon a renunciation of a contract in relation to the sale of land by the plaintiff, it is his duty to make it out unmistakably, and that he himself had assented to it. *Faw v. Whittington*, 321.

4. The acts and conduct constituting an abandonment by the vendee of his contract of purchase of land must be positive, unequivocal, and inconsistent with the contract. Mere lapse of time or other delay in asserting his claim, unaccompanied by acts inconsistent with his rights, will not amount to a waiver or abandonment. *Ibid.*

5. Where A, without consideration, promised to devise a tract of land to B, and on the faith of that promise B conveyed a tract of land to C; and afterwards A conveyed the tract she promised to devise to B to C: *Held*, that the promise of A to devise to B was not a contract by A which a court would specifically enforce, or by force of which a court would hold her a trustee of her land subject to her life estate for the benefit of B; and that it did not destroy her power freely to devise or otherwise convey her land; nor did it estop C from accepting the conveyance from her. *East v. Dolihite*, 562.

6. A person may make a binding contract to devise his lands in a particular way, and a court of equity, in a proper case, will enforce in effect a specific performance of the contract; and also an owner of land may convert himself into a trustee for some other person without writing by an estoppel *in pais*. *Ibid.*

See "Evidence," 3, 6; "Execution Sale," 3; "Public Debt"; "Sheriffs," 6.

COPIES.

See "Attachment," 3; "Evidence," 11.

COUNTER-CLAIM.

Under the C. C. P. there is but one form of civil action, and the defendant may set up as a counter-claim any claim arising out of the transaction set out in the complaint in favor of the defendant and against the plaintiff, whether the action arises out of a tort or a contract. *Bitting v. Thaxton*, 541.

See "Executors and Administrators," 10.

COUNTY COMMISSIONERS.

Where a late County Court borrowed money in 1862 without having any legal authority so to do, and the plaintiff became the county's surety on the bond for the borrowed money, a part of which he has since been compelled to pay under suit: *Held*, that such plaintiff had no right to call upon the County Commissioners of the said county to reimburse him for the amount already paid or to exonerate him from the payment of the balance due. *Davis v. Commissioners*, 441.

COVENANT.

See "Advancements," 1; "Sureties," 1.

CROPPERS.

See "Landlord and Tenant," 3.

DAMAGES.

See "Estoppel"; "Injunction," 5; "Municipal Corporations," 1; "Practice," 2.

DECLARATIONS.

See "Evidence," 10.

DEED.

1. A deed void at the time of its execution cannot be made valid and effective by any amendment to the original proceedings under which such deed was executed. *Simonton v. Brown*, 46.

2. Where, in a grant from the State, a tract of land is described as follows: "A tract of land containing 173 acres, lying and being in our county of Wilkes, on a big branch of Luke Lee's Creek, beginning at or near the path that crosses the said branch that goes from Crane's to Sutton's, on a stake, running West 28 chains 50 links to a white-oak in Miller's line; then North 60 chains to a stake; then East 28 chains 50 links to a stake; then South 60 chains to the beginning"; and no evidence being offered to show the location of Miller's line or of the white-oak referred to: *It was held*, that the description is fatally defective, and cannot be made sufficiently definite by parol testimony. *Hinchey v. Nichols*, 66.

3. Where an infant *feme covert* acknowledged the execution of a deed, and her privy examination was taken before a Judge of the Superior Court: *Held*, that the deed was then a conveyance of record, and could not be collaterally impeached in an action of ejectment. *Wright v. Player*, 94.

4. Where A conveyed a certain tract of land known as his "home place," "except so much thereof as may be laid off and assigned as a homestead under the act of Assembly, and which is expressly excepted from this conveyance": *Held*, that the exception is operative and should be allowed to have effect. *Branch ex-parte*, 106.

5. A deed conveying to A the land on one side of a river "with all the appurtenances thereto belonging" does not convey the title to one-half of a ferry which is not annexed as of right as appurtenant to said land. *Haithcock v. Manufacturing Company*, 410.

DEED—*Continued.*

6. Where the gravamen of the plaintiff's complaint is that the execution of a certain deed was procured by fraud and undue influence, it is error to submit to the jury issues which involve matters of evidence only tending to establish or deny the main issue. *Timmons v. Westmoreland*, 587.

DEFENSE AFTER JUDGMENT.

See "Practice," 16.

DELIVERY.

See "Gift."

DEMAND.

See "Bills, Notes," etc., 1.

DEMURRER.

1. A misjoinder of parties, or a misjoinder of causes of action, is ground of demurrer, and can be taken advantage of in no other way. *Burns v. Ashworth*, 496.

2. Under our liberal system of pleading, a joinder of unnecessary parties is not fatal, and may be treated as surplusage. And several causes of action may be joined in the same complaint, provided they arise out of the same transaction. *Ibid.*

DEPOSIT.

See "Bankruptcy."

DEPOSITIONS.

1. It is too late to object to a deposition on the trial because it was taken after issue joined, and the Clerk, instead of the Judge presiding, named the commissioner therein. The objection should have been taken at the time the depositions were passed upon by the Clerk. And when a deposition lies on file, for a reasonable time up to the trial, without objection it is presumed to have been passed upon and all objection for irregularity is waived. *Kerchner v. Reilly*, 171.

2. Depositions are admissible in evidence on the trial of an issue in bastardy, as they are in other *civil* cases. *Tidline v. Hickerson*, 421.

See "Bastardy," 2.

DEVASTAVIT.

See "Executors and Administrators," 1; "Chattels."

DEVISEES.

See "Dower," 1; "Wills," 1, 2, 3, 4.

DILIGENCE.

See "Guaranty," 1, 2.

DISCRETION.

See "Amendments," 2; "Judges Superior Courts," 4; "Practice," 6.

DIVORCE.

1. On a trial of an action for divorce, it is the duty of the presiding Judge to confine the jury to the issue, by reciting the testimony and applying the law pertinent thereto. And it is error for his Honor to charge that "it is for the jury to say whether her" (the plaintiff's) "complaints are well founded. According as they shall determine, she is to return to her home, or to have that portion of her husband's estate allotted to her which the law allows in such cases," and such charge entitled the defendant to a new trial. *Smith v. Smith*, 159.

2. In a petition for divorce *a vinculo matrimonii* by the husband, on account of adultery committed by the wife, where the jury found that both parties had been guilty of adultery, and where no condonation on the part of the wife was proven: *Held*, that the Judge below committed no error in dismissing the petition at the cost of the petitioner. *Horne v. Horne*, 530.

DOMICILE.

It is well settled that one may abandon his domicile of origin, either with the design of acquiring another, or with the design of acquiring no other; and then until he acquires another, he is without domicile, except the domicile of actual residence. *Hicks v. Skinner*, 1.

DOWER.

Where land, devised to a husband, had, after his death, been assigned to his widow for dower in 1864, and the same had been sold under an order of Court in 1872, in a petition to sell the lands of the testator, who had devised said lands to pay his (the said testator's debt) to which petition the widow was not made a party: *Held*, that the sale was void as to her, and that no subsequent amendment, by which she was made a party, could make the sale valid, or affect her right to dower. *Simonton v. Brown*, 46.

See "Homestead," 1.

EJECTMENT.

Where a plaintiff, in an action of ejectment, shows that the defendant was not in possession of the premises in dispute when the action commenced, he must be nonsuited. *Ward v. Parks*, 452.

See "Homestead," 10.

ELECTION.

See "Judges of the Superior Court," 3.

ENDORSEMENT.

See "Evidence," 2.

EQUITY.

See "Evidence," 13; "Execution Sale," 4; "Practice," 1; "Sale of Land for Partition"; "Specific Performance."

ERROR.

See "Evidence"; "Fixtures"; "Injunction," 2, 3; "Justices of the Peace," 8; "Larceny," 2; "Mortgage," 1; "Murder," 1, 6; "Practice," 2, 7, 15; "Witnesses," 1.

ESTATE.

See "Agent," 1; "Executors and Administrators," 8; "Chattels," 1; "Wills," 1, 2.

ESTOPPEL.

The damage to support an estoppel, and convert the owner into a trustee, must be something more substantial than what would technically amount to a consideration in a contract. It must be a substantial one, and of such character that the person sustaining it cannot be put back in his former condition, and cannot be adequately compensated by pecuniary damages. *East v. Dolihite*, 562.

EVIDENCE.

1. On the trial of an indictment for stealing a national bank note, and a United States Treasury note, it is necessary for the jury to find specifically that such bank-note or such Treasury-note was stolen. And evidence that the prisoner stole one or the other of such notes, the witness being unable to say which, will not justify a verdict of guilty. *State v. Collins*, 144.

2. Where A endorsed a note to B, with the understanding that such endorsement should have no other effect than to assign the property in the note to the plaintiff, and to guaranty him against its confiscation by the United States: *Held*, that parol evidence was admissible to prove such understanding and contract. *Mendenhall v. Davis*, 150.

3. Where one P had been selling goods on his own account and failed, and afterwards K, the plaintiff, under a written contract, furnished P goods to sell as his agent; and the defendant, a sheriff, having an execution against P in favor of one M, seized the goods as the property of P: *Held*, that a conversation between P and M, tending to show that M knew that P was K's agent, was competent evidence in a suit against the Sheriff for conversion of the goods. *Kerchner v. Reilly*, 171.

4. Upon a trial for murder, it is error to call on a witness to give his "best impression" concerning transactions of which he has no personal knowledge. *State v. Thorp*, 186.

5. The best evidence of a discharge in bankruptcy is the certificate of such discharge; and this the party pleading the bankruptcy must produce or account for its non-production, before parol evidence of the discharge can be admitted. *Reagan v. Reagan*, 195.

6. Parol testimony is inadmissible to add to or alter a written contract. *Etheridge v. Palin*, 213.

7. Where a plaintiff alleges that he was induced to purchase a tract of land sold by a sheriff, by the conduct of one who had

EVIDENCE—*Continued.*

a prior judgment lien on said land and who was present and also bid at the Sheriff's sale: *It is error* in the Court below to treat an issue involving the fact as to whether the plaintiff was so induced as alleged, as a question of law, and refuse to submit the same to the jury, and to reject the evidence offered to disprove it. *Holt v. Bason*, 309.

8. The confessions of a prisoner, to be competent evidence on a trial of murder, must be voluntary: *Therefore*, where the facts showed that the prisoner was pursued by three armed men, and being arrested, replied to the questions accusing him of the alleged homicide: *It was held*, that his confession under such circumstances could not be received as evidence against him. *State v. Dildy*, 325.

9. Upon a trial of larceny, it is competent for the State to show the condition of the prosecutor at the time of the alleged larceny, and for some time thereafter, in order to prove that he had been drugged, as well as the potent effects of the drugs administered. *State v. Buckley*, 358.

10. The declarations of a lessee (not a party to the action) concerning the lease and the transactions between himself and the defendant, are not admissible in evidence in an action between such defendant and a third party, in which a counter-claim is set up growing out of an assignment of the lease. *Hunsucker v. Farmer*, 372.

11. A copy of an account taken from a merchant's books is only a declaration of the merchant, and is inadmissible in evidence for the purpose of showing that he converted a quantity of B's tobacco to his own use by selling it to the merchant, and having it credited to his own individual account. *Bitting v. Thaxton*, 541.

12. It is competent to show that "at the regular time defendant deposited the tobacco with A, he believed A to be solvent," in order to prove that the defendant acted in good faith. *Ibid.*

13. If an answer to a bill in equity, filed before the adoption of the Code of Civil Procedure, be directly responsive to the material facts charged in the bill, and be clear, positive and precise in its denial of them, and be not disproved or discredited in this part by what is found in any other part of it, *it is evidence for the defendant.* But if the answer is defective in these requirements, and there is a replication, the rule does not apply. *Longmire v. Herndon*, 639.

See "Agent," 2, 3.

EXECUTION.

See "Contingent Remainder," 1; "Executor *de son tort*"; "Homestead," 3, 7, 8, 10; "Injunction," 2; "Sheriffs," 5, 7.

EXECUTION SALE.

1. Before the adoption of the C. C. P. no rule of law was more clearly settled than the rule that a purchaser at a sheriff's sale (the judgment and execution being regular) acquired

EXECUTION SALE—*Continued.*

the title of the defendant in the execution. *Smith v. Smith*, 228.

2. How far this rule has been changed since the adoption of the Code of Civil Procedure—*quære. Ibid.*

3. Where A contracted in writing to convey a tract of land to B, who paid a part of the purchase money, entered upon the land and then conveyed his interest to C; and a judgment being obtained against A, the land was sold: *Held*, that the purchaser at such sale acquired no title, as the interest of A was not liable to execution. *Tally v. Reid*, 336.

4. No equity can be sold under the Act of 1812, unless the sale of such equity draws to it the legal estate. This cannot be if other equities are attached to such legal estate. *Ibid.*

5. A vendor, who has sold land and given a bond to make title when the price is paid, and who has received a part of such price, has no interest in the land which can be sold under an execution. *Folger v. Bowles*, 303.

See "Judgment," 2, 3.

EXECUTORS AND ADMINISTRATORS.

1. Where one of two administrators takes exclusive possession of the effects of their intestate, and in his administration thereof commits a *devastavit*, his co-administrator will be responsible therefor, on his official bond, although no assets ever came into his hands. *Rascoe v. Hyman*, 22.

2. An administrator who has been fixed with assets is not necessarily a dishonest debtor, or been guilty of fraud in misapplying these assets, so as to exclude him from the privilege of being exempted by the Constitution from being imprisoned for debt. *Melvin v. Melvin*, 384.

3. An affidavit that does not set forth how the funds in the hands of an administrator have been misapplied, is not sufficient to justify holding him to bail. *Ibid.*

4. After the expiration of six months from the death of a decedent, the public administrator and those having a right of priority failing to apply for letters of administration, the Probate Judge is authorized to treat all rights of preference as renounced, and, in the exercise of his discretion, to appoint some suitable person to administer upon the estate of such decedent. *Hill v. Alspaugh*, 402.

5. A judgment against an administrator, fixing him with assets, and which judgment he has paid, is no bar to an account of assets subsequently received and not accounted for. *McAdoo v. Thompson*, 408.

6. Where an administrator kept the Confederate money of his intestate "in a tin box promiscuously with his own private money of the same character, without package or label to distinguish it as a trust fund, and bonded it in the same indiscriminate manner, *taking certificates in his own name*, and kept no account of the respective amounts of the trust fund

EXECUTORS AND ADMINISTRATORS—*Continued.*

and his own private money thus bonded": *Held*, that he was responsible for the value of such Confederate money in the present currency, with interest from the time of its reception. *Lippard v. Roseman*, 427.

7. An administrator who received on 11 May, 1863, Confederate money for a debt due the estate of his intestate, is chargeable only in the absence of fraud or bad faith with the value of such money in present currency at the date he received it. Otherwise if the money was received so late in the war as to amount to a notice that the person entitled to it would receive it. *Wells v. Sluder*, 435.

8. Where after the death of an administrator and before the appointment of an administrator *de bonis non*, the next of kin brought an action upon the administration bond: *Held*, that the estate was in abeyance, and neither the next of kin nor any one else except an administrator *de bonis non* had a right of action against the bond of the original administrator. *Goodman v. Goodman*, 508.

9. In such case, after action brought, the Superior Courts have no power to amend the pleadings by striking out the names of the relators and inserting that of an administrator *de bonis non* subsequently appointed. *Ibid.*

10. Where an administration is closed, the commissions due the executors are owing; and if the amount thereof be ascertained before an action is brought, such commissions may be pleaded as a counter-claim. *Barlow v. Norfleet*, 535.

11. Although it is a general rule that the assent of the executor to the first taker of a legacy, limited over on a particular estate by way of remainder, or executory bequest, is an assent to all persons in remainder, yet such assent cannot be construed into a promise on the part of the executor to pay the legacy a second time to the remainderman, when he has once paid it to the first legatee. *Hodge v. Hodge*, 616.

See "Chattels"; "Homestead," 13; "Probate Courts," 3, 5; "Sale of Land for Assets," 1, 2.

EXECUTORS DE SON TORT.

A purchaser of property exempt from execution under the Homestead act cannot be held liable as *executor de son tort;* and an assignment of such property by a debtor without valuable consideration is not therefore fraudulent. *Winchester v. Gaddy*, 115.

FEES.

See "Action," 4.

FELONIOUS INTENT.

See "Larceny," 2.

FELONY.

See "Indictment," 9.

FEME COVERT.

1. A *feme covert* cannot convey her property without the written assent of her husband. *Harris v. Jenkins*, 183.

2. Where a *feme covert* executed a bond, without such assent, and judgment was obtained thereon, and her property levied on: *Held*, that the execution of an instrument by the husband, for the purpose of postponing the sale of the property, was not a ratification of the bond executed by the wife, and did not obviate the necessity of his written assent. *Ibid.*

3. The right of suing alone is a privilege which may be used for the advantage of a *feme covert*, but a failure to exercise this privilege cannot operate to her prejudice. *Lippard v. Troutman*, 551.

See "Deeds," 3; "Statute of Limitations," 2, 3.

FIXTURES.

It is not error for a Judge in the Court below in an action of ejectment to charge the jury that a "carding machine," requiring several men to move it, not fastened to the house in which it was used, was a fixture, and nothing else appearing, passed with the land. *Deal v. Palmer*, 582.

FORCIBLE TRESPASS.

See "Justices of the Peace," 6.

FRANCHISES.

See "Railroads," 1, 2, 3; "Taxes and Taxation," 1.

FRAUD.

The words "except in cases of fraud," in sec. 16, Art. I, of the Constitution, comprehends not only fraud in attempting to hinder, delay and defeat the collection of a debt by concealing property, and other fraudulent devices, but embraces also fraud in making the contract—false representations for instance—and fraud in incurring the liability; for instance, when an administrator commits a fraud by applying the funds of the estate to his own use, paying his own debts, and the like. *Melvin v. Melvin*, 384.

See "Homestead," 5; "Evidence," 7; "Executors and Administrators," 7.

FRUCTUS INDUSTRIALES.

See "Chattels."

GAUGE.

See "North Carolina Railroad."

GENERAL ASSEMBLY.

See "Mandamus," 1; "Judges of the Superior Court," 2.

GIFT.

To make a gift valid to pass title, there must be a *delivery*, either actual or symbolical: *Therefore*, where a father pointed out a colt to his daughter, at the same time saying to her, "That

GIFT—*Continued.*

is your property; I give it to you," but retained possession, no title passed to the daughter. *Brewer v. Harvy*, 176.

GOOD FAITH.

See "Evidence."

GUARANTY.

1. The same strict degree of diligence which was required of a guarantor before and since the war, could not be exacted of him during the war. That forbearance which would amount to laches now, was, from the very nature of things, unavoidable then. *Kinyon v. Brock*, 554.

2. Therefore, where in the spring of 1860, A, the testator of the defendant, executed to B a guaranty on the note of C, which note was made on 12 March, 1860, and was due on 1 September following: *Held*, that the failure of B to sue C during the war, and the subsequent insolvency of C, did not amount to laches sufficient to release A from his guaranty. *Ibid.*

See "Evidence," 2.

GUARDIAN AD LITEM.

See "Infants," 3.

GUARDIAN AND WARD.

1. A guardian is liable not only for what he does receive, but for what he ought to receive; and if he ought to receive a certain amount in money, and does not, but takes something else—his own bond, for instance, in the place of money—he and his sureties are liable. *Avent v. Womack*, 397.

2. Therefore, where a guardian bought property for himself at the sale of the father of his ward, giving bond with surety therefor to the administrator, and subsequently the administrator surrendered the bond, such guardian who receipted therefor, as so much money paid his ward, under the impression that the ward was entitled to something of his father's estate as distributee, and it subsequently turned out that the estate was insolvent: *Held*, that the non-payment of the amount receipted for was a breach of the guardian bond, and the surety thereon were liable therefor. *Ibid.*

3. A guardian who, on 20 December, 1862, collected on a well-secured *ante*-war guardian note $3,000, and invested the same for the benefit of his ward in seven-thirty Confederate bonds, as he also did a large amount of his own funds, is not guilty of such laches as to render him liable for the amount. *Longmire v. Herndon*, 629.

HABEAS CORPUS.

See "Husband and Wife," 1.

HOMESTEAD.

1. The acceptance of a homestead laid off in the lifetime of her husband, by a widow, is no bar to her right of dower in the other lands of her husband, outside of such homestead. *McAfee v. Bettis*, 28.

HOMESTEAD—*Continued.*

2. PEARSON, C. J.: We are inclined to the opinion that a wife has no power to bind herself by a covenant of warranty in a deed which she executes only for the purpose of relinquishing her claim to the homestead, and her contingent right of dower in the land covered by the homestead. *Ibid.*

3. The allotment of "an interest of one hundred dollars in his half of a mill," as the remainder of a homestead, is so vague and indefinite as to be void and confer no exemption from execution. *Coble v. Thom*, 121.

4. It is a fatal defect to a re-allotment of a homestead for it to appear that the appraisers were not sworn. *Ibid.*

5. It is the duty of a sheriff to lay off the homestead of the defendant in the execution, and to sell the excess in a prudent and just manner, so as to realize a fair price: *Therefore*, where a sheriff sold, at the instance of the defendant, several parcels of land *en masse* and subject to the homestead: *It was held*, that such sale was fraudulent, and might be avoided by a creditor of such defendant, not present, nor consenting to the sale. *Andrews v. Pritchett*, 135.

6. The Homestead Act does not impair the obligation of contracts, and is therefore not unconstitutional. *Wilson v. Sparks*, 208.

7. The homestead is not subject to execution for the payment of debts contracted before the adoption of the Homestead Act. *Ibid.*

8. A defendant, entitled to a homestead in certain lands, which have been sold under an execution against him, is not estopped from claiming his homestead by accepting a lease for the same land from the purchaser at execution sale. *Abbott v. Cromartie*, 292.

9. This right to a homestead is no defense whatever by the tenant to an action to recover the premises brought by the landlord. The tenant must wait until his term expires, before asserting his claim to the homestead. *Ibid.*

10. In an action of ejectment the plaintiff claimed under a sheriff's deed, and the defendant alleged that the land so sold was exempt from execution as a homestead, and that the sale by the Sheriff was therefore void; and it appearing on the trial that the land was sold for the payment of the purchase money: *Held*, that although there was no evidence of record that such was the fact, yet as the Sheriff took the responsibility of acting on his own conviction, and as his conclusion was right, the sale is not void. *Durham v. Bostick*, 353.

11. The homestead law applies to debts contracted prior to its adoption; and by sec. 3, Art. X, of the Constitution, the right to a homestead is given to the minor children of an insolvent father, regardless of their pecuniary circumstances. *Allen v. Shields*, 504.

12. Whether since the Act of 1871-'72, ch. 95 (Battle's Revisal, ch. 17, sec. 59), a valid sale of an infant's land can be made without a personal summons—*quære*. *Ibid.*

13. When an administrator sells land by an order of Court to pay the debts of his intestate, he must lay off a homestead for

HOMESTEAD—*Continued.*

the parties entitled thereto. His failure to do so does not affect their right to such homestead. *Ibid.*

See "Executors *de son tort*," 1.

HUSBAND AND WIFE.

A mother, separated from her husband, is entitled to the custody of her infant child, in preference to the grandfather, into whose hands the child had been placed by the father soon after its birth. *Thompson v. Thompson*, 32.

INDICTMENT.

1. On the trial of an indictment for riot, etc., the jury found as a special verdict, "that the defendants and others, assembled in the town of Oxford to celebrate the Emancipation Proclamation, and with two drums and fifes, marched up and down the streets, for two or three hours. Some were mounted, but being told to dismount, they got down and hitched their horses. When told by the Mayor to desist, they at first refused, but being notified by the constable to stop, the defendant Hughes, with the procession, beating the drum, went to the Mayor's office to make up a case to be tried before a magistrate to test the Mayor's right to forbid the procession. There were no arms in the crowd except sabers used by the officers; no violence in word or deed was offered to any citizen; some of the citizens were disturbed by the noise of the drums, and some of the persons were drinking; the streets were obstructed from time to time during the interval, and one horse hitched in a lot broke loose": *Held*,

1. That this was not an unlawful assembly, and that an unlawful assembly was a necessary element of a riot.

2. Beating the drum and blowing the fife do not *per se* constitute a nuisance: and to make them such, the exceptional facts and circumstances which make acts otherwise innocent a crime, must be set forth particularly, so that the Court can see that from their very nature, if proved, they are a nuisance to the whole community.

3. If the procession was lawful, and the streets were obstructed no more than is ordinarily the case under such circumstances, the obstruction of the streets is not an indictable offense. *State v. Hughes*, 25.

2. Upon an indictment for larceny and receiving stolen Treasury-notes: *Held*, that it was error to admit evidence showing "that shortly after the alleged stealing the defendant purchased several articles at a store, and that witness saw a number of bills in the pocket-book of the defendant, of what denomination he was ignorant." *State v. Carter*, 99.

3. An indictment, charging that A, "one cow of the value of ten dollars of the goods," etc., "then and there being found, maliciously did pursue, with the intent unlawfully and wickedly to wound and kill, and did kill her," only charges an injury to personal property, and cannot be maintained. *State v. Allen*, 114.

4. Wounding of cattle maliciously is not an indictable offense at common law. *State v. Manuel*, 201.

INDICTMENT—*Continued.*

5. A druggist, who in good faith and with due caution sells as a medicine, by the direction of a practicing physician, spirituous liquors in a quantity less than a quart, is not indictable therefor. *State v. Wray*, 253.

6. Upon an indictment, under sec. 15, ch. 64, Battle's Revisal, for removing a crop by a lessee: *It was held*, that gathering the crop and putting the same in a crib on the land upon which it was made, although under the control of the lessee—no intention of depriving the lessee of his share of said crop appearing—did not come within the meaning of the statute, and was not an indictable offense. *Warner v. Spencer*, 381.

7. *It was further held*, that, where such lessee, after so putting the crop in the crib, converted a portion thereof to his own use by feeding it to his stock, without the consent of the landlord, this was a removal within the meaning of the statute, and indictable. *Ibid.*

8. In an indictment under sec. 116, ch. 32, Battle's Revisal, for entering on the land of another and taking therefrom turpentine, etc., it is necessary that a "license so to enter" should be distinctly negatived as an essential part of the description of the offense. *State v. Bullard*, 445.

9. In an indictment for felony (containing only one count), there cannot be a conviction for a minor offense included within such felony, if such minor offense be a misdemeanor. Therefore, in an indictment against A for rape, he cannot, under the same bill, be found guilty of an assault and battery. *State v. Durham*, 447.

10. In an indictment for an assault with intent to commit a rape, the omission of the word "feloniously," in the description of the offense, is a fatal defect. *State v. Scott*, 461.

See "Evidence," 1; "Larceny," 1, 3; "Murder," 1.

INFANTS.

1. Any irregularity on the part of a sheriff in serving a summons is waived by the defendant's answering, although such defendant be an infant. *Turner v. Douglass*, 127.

2. An infant is properly brought into Court, just as any other defendant is. Where there is no general guardian, the service of the summons must be a personal one. *Ibid.*

3. A plaintiff is not bound to move for the appointment of a guardian *ad litem* for an infant defendant; and his failure to do so is not such laches as will work a discontinuance of the action. *Ibid.*

4. In an action against an infant, who appears by an attorney, an order changing the venue is not irregular or void; it is erroneous, and may be reversed or vacated upon application of the infant upon his arriving at age. *Ibid.*

See "Deed," 3; "Homestead," 11, 12; "Husband and Wife," 1; "Probate Courts," 2.

INJUNCTION.

1. No party to a suit is permitted, by a new and independent action, to pray for an injunction to seek any relief which he might obtain by a motion in the original cause. *Faison v. McIlwaine*, 312.

2. *It is error* to grant an injunction staying execution on a judgment in the absence of notice to the plaintiff, and of an affidavit stating a definite sum by way of set-off claimed; or to stay execution upon a judgment under an undertaking in a less sum than such judgment. *Ibid.*

3. *It is error* also to refuse a motion to vacate an injunction when every material allegation in the complaint is positively denied by the answer. *Ibid.*

4. An injunction will not be granted to restrain the erection of a dam, whereby the mill-wheel of the plaintiff is flooded so as to become useless. *Burnett v. Nicholson*, 334.

5. For such an injury, damages will adequately compensate; and should the annual damage exceed twenty dollars, the plaintiff is remitted to his common-law action, and can compel an abatement of the nuisance. *Ibid.*

INSANITY.

See "Murder," 3.

INTEREST.

See "Judge's Charge," 2.

JOINDER.

See "Action," 1, 2, 5, 6, 7; "Pleading," 1.

JUDGES OF THE SUPERIOR COURT.

1. Where A was elected Judge of the Superior Court and declined to accept the office and never qualified: *Held*, that there was a vacancy within the meaning of sec. 31, Art. IV, of the Constitution, and the Governor had the power to fill such vacancy by appointing a successor. *Cloud v. Wilson*, 155.

2. The General Assembly has no power to order an election to fill such vacancy, and any law for that purpose is unconstitutional and void. *Ibid.*

3. The words "until the next regular election," in sec. 31, Art. IV, of the Constitution, means until the next regular election for the office in which a vacancy has occurred. *Ibid.*

4. In a civil trial in the Court below, the presiding Judge is the proper person to determine whether the jury has returned a verdict, or only tendered one; and he may, in his discretion, in view of all the circumstances, discharge them or call them into the box again for the purpose of returning a proper verdict. *Willoughby v. Threadgill*, 438.

See "Appeal," 6; "Amendment," 2; "Practice," 6, 7, 9, 10, 14, 15; "Removal of Cases."

JUDGE'S CHARGE.

1. What are the boundaries of a tract of land is a question of law. But if the Judge below leaves such question to the jury, and they find the law as his Honor ought to have held, no advantage can be taken of his Honor's charge. *Johnson v. Ray*, 273.

2. A Judge has no right to leave it to the jury to give the plaintiff interest or not, as they should think proper. He should have instructed them that if they found that the defendant owed the principal money demanded, the plaintiff was entitled to interest from the time it was due. *Barlow v. Norfleet*, 535.

See "Divorce," 1; "Larceny," 2; "Murder," 6.

JUDGMENT.

1. A judgment taken against A, B and C, no service of summons having been made upon A, is as to A erroneous. *Pender v. Griffin*, 270.

2. The sale of land under execution in nowise affects the lien of a prior judgment; nor does it necessitate any change in the proceedings required to make such liens effectual. *Halyburton v. Greenlee*, 316.

3. If, therefore, a sale of land is made under a junior docketed judgment, the purchaser buys, in effect, only an equity of redemption; that is, the title to the land upon paying off prior liens. If he neglects to pay off the prior liens, the prior judgment creditor may enforce his lien by a sale. *Ibid.*

4. Where a defendant has never been served with process, nor appeared in person, or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated wherever and whenever offered, without any direct proceeding to vacate it. *Doyle v. Brown*, 393.

See "Attachment," 1; "Executors and Administrators," 5; "Feme Covert," 2; "Superior Courts," 4, 5.

JURISDICTION.

See "Superior Courts," 1, 3, 7.

JURY.

See "Judges of the Superior Courts," 4; "Murder"; "Practice—Criminal Cases."

JUSTICES OF THE PEACE.

1. A justice of the peace has no jurisdiction over the offense of larceny of growing corn. The Act of 1873-'74, ch. 176, does not sufficiently express the intention to give a justice jurisdiction in such cases. *State v. Cherry*, 123.

2. A justice of the peace has jurisdiction to hear, try and determine the offense of keeping an unlawful fence. *State v. Quick*, 241.

3. Upon an appeal from the judgment of a justice in such cases, it is unnecessary that the defendant should be tried upon an indictment found by a grand jury. *Ibid.*

JUSTICES OF THE PEACE—*Continued.*

4. A justice of the peace has no jurisdiction to try and determine the offense of assault and battery, unless the provisions of ch. 33, sec. 119, Bat. Rev., has been complied with. *State v. Gardner*, 379.

5. *Therefore*, where A was indicted in the Superior Court for an assault and battery committed in the presence of a magistrate, and upon a plea of "former conviction" it appeared that he had been fined by the Justice "for contempt of Court and assault" on the prosecutor: *Held*, that as the provisions of sec. 119 had not been complied with, the facts did not sustain the defendant's plea, and that it was no defense to the indictment in the Superior Court. *Ibid.*

6. Ch. 176, Acts of 1873-'74, enlarging the jurisdiction of justices of the peace, does not embrace the offense of forcible trespass. *State v. Batchelor*, 468.

7. A justice of the peace has authority, under sec. 50, ch. 65, Bat. Rev., to issue a summons to any county in the State, and bring the defendant before his Court for trial. *Sossamer v. Hinson*, 578.

8. It is not error to refuse a motion to transfer a case brought up from a justice's court, upon a *recordari*, from the summons docket to the civil issue docket, when an error is assigned, and no merits shown or alleged. *Ibid.*

See "Landlord and Tenant," 1; "Practice," 6; "Superior Courts," 1, 3.

LACHES.

See "Infants," 3; "Trust and Trustees," 2.

LANDLORD AND TENANT.

1. Summary proceedings before a justice of the peace, under the "Landlord and Tenant Act," cannot be sustained against a mortgagor, who holds over after a sale of the mortgaged premises. *McMillan v. Love*, 18.

2. The assignee in bankruptcy of such mortgagor is entitled to a writ of restitution, upon the dismissal of the plaintiff's proceedings. *Ibid.*

3. A written agreement between A and B and C, that B and C are to cultivate A's land, who is to pay them one-half the crop as wages, after deducting advances, constitutes B and C croppers and not tenants. *Hudgins v. Wood*, 256.

4. B and C have an interest which they can assign, subject to the charge of A for advancements; and such assignment in writing is not necessarily a mortgage or in the nature of one, and need not be registered. *Ibid.*

See "Homestead," 9; "Mortgage," 3.

LARCENY.

1. Where A was indicted for stealing a hog, and on the trial it was shown that a hog, belonging to the prosecutor, had been killed and concealed in the corner of the fence, covered with

LARCENY—*Continued.*

leaves; and that A was seen at night to go to the place and look carefully around and stoop over as if about to take the hog, and being hailed, fled: *Held*, that these facts alone would not justify a verdict of guilty. *State v. Wilkerson*, 376.

2. In the trial of a defendant for larceny, a charge from the Court that the jury must find that the defendant took the property alleged to be stolen "with a felonious intent," and that "the question of intent had been fully discussed by counsel, and it was a question for them to decide," without at the time explaining to the jury what is meant by a "felonious intent," is error, and entitles the defendant, if convicted, to a new trial. *State v. Gaither*, 458.

3. The question of what is meant by a "felonious intent" is one for the Court; its existence at a particular time is for the jury to say. *Ibid.*

4. On the trial of an indictment for stealing a national bank note, and a United States Treasury note, evidence that the witness *believed* that it was a national bank note, will support a verdict of guilty. *State v. Freeman*, 251.

See "Evidence," 1, 6; "Indictment," 2; "Justices of the Peace," 1.

LARCENY OF GROWING CROPS.

See "Justices of the Peace," 1.

LEASES.

See "Evidence," 10; "Indictment," 6, 7; "Mortgage," 3; "North Carolina Railroad."

LEGISLATIVE SCALE.

A note dated 15 August, 1864, payable six months after date, in current funds, when called for, becomes due at the end of six months from date, and is subject to the legislative scale. *Davis v. Glenn.*

LIEN.

See "Attachment," 2; "Judgment," 2, 3.

MALICIOUS MISCHIEF.

See "Indictment," 3.

MONTHS.

"Thirty days," as used in Art. IV of the Constitution, is not synonymous with "one month"; it may be more or less. *State v. Upchurch*, 145.

MOTION.

See "Injunction," 1; "Practice," 1, 11, 15, 16; "Probate Courts," 3.

MORTGAGE.

1. Nor is it error to charge that although the plaintiff, a mortgagee, had title to a "carding machine," and he afterwards chose to buy the mortgagor's interest in the same and pay

MORTGAGE—*Continued.*

his price therefor, the sale would be a valid and a good one. *Deal v. Palmer*, 582.

2. An unregistered mortgage, though binding as between the mortgagor and mortgagee, is not valid as to a third party purchasing the mortgaged property for a valuable consideration and without notice. *Ibid.*

3. The Landlord and Tenant Act does not apply to a mortgagor who is allowed to remain in possession, and on demand after default refuses to surrender possession; and the provisions of that act cannot be extended by any contrivance of lease and lessee, so as to give to the mortgagee the benefit of having summary proceedings, as against a lessee for a term of years. *Green v. Wilbar*, 592.

See "Action," 1; "Landlord and Tenant," 1, 2; "Payment," 3.

MUNICIPAL CORPORATIONS.

1. A municipal corporation is not liable to an action for damages, either for the non-exercise of, or for the manner in which, in good faith, it exercises discretionary powers of a public or legislative character. *Hill v. Charlotte*, 55.

2. Sec. 10, ch. 5, Private Laws of 1868-'69, which authorizes the Mayor and Aldermen of the city of Wilmington, from time to time, to assess the value of property within the city for taxation by the city, is unconstitutional. (Const., Art. V, sec. 3). *Railroad v. Wilmington*, 73.

3. Art. VII, sec. 9, of the Constitution, clearly implies that the valuation upon which city taxes are to be uniformly levied is to be that assessed by the Township Trustees. *Ibid.*

See "Constitution," 3, 4.

MURDER.

1. In an indictment against three for murder, charging that H, one of the prisoners, fired the gun, and that the other two were present aiding and abetting: *Held*, that it was not error in the Court below to charge the jury that if either of the prisoners fired the gun, the others being present aiding and abetting were equally guilty. *State v. Hill*, 345.

2. Where, upon the trial of an indictment for murder, a juror related to the prisoner was passed by the State, the Solicitor being ignorant of such relationship, and upon being tendered, made known the relationship himself, before being sworn: *Held*, that it was not error for the Court to stand such juror aside until the panel was completed. *State v. Cunningham*, 469.

3. Where a prisoner relies upon the plea of insanity, but there is no evidence whatever that he had ever exhibited any sign of insanity, evidence tending to show that some of his uncles and aunts were insane, is inadmissible. *Ibid.*

4. The sentence of the Court must be carried into execution by the Sheriff of the county in which the prisoner is tried. *Ibid.*

MURDER—*Continued.*

5. Where upon an indictment for murder, several persons were sworn, in the regular way, as to their competency to serve as jurors, and held the Bible in their hands until they were accepted, when the Clerk proceeded to swear them as jurors, omitting the words, "you swear" in the last oath: *It was held*, that the omission, though irregular and reprehensible, did not vitiate the verdict. *State v. Owen*, 605.

6. Where the presiding Judge, on a trial of an indictment for murder, charged the jury: "The State's counsel says he has introduced Dr. Richardson, an intelligent physician, who gives it as his decided opinion, after hearing the testimony, that the deceased came to his death by strangulation and not by poison, and that this ought to have great weight with the jury"; and then immediately added: "It is true, the opinion of experts ought to have weight with the jury, as they are familiar with these questions; but the jury are not concluded by their opinions; if the evidence justifies, they may find against such opinion. They must find the facts upon the whole evidence": *Held*, that this was not an expression of opinion, and not prejudicial to the prisoner. *Ibid.*

NATIONAL BANK NOTES.

See "Larceny," 3.

NEGLIGENCE.

Where in an action against a railroad company brought within six months, to recover damages for an injury to plaintiff's cow, it was proved that the cow jumped on the track at the opening of a cut some two hundred yards in front of the defendant's engine, which was running at the rate of twenty-three miles an hour; and it was further proved that as soon as the cow was discovered the engineer blew the alarm whistle and reversed the engine and the brakes were applied, and that the engine running at that rate of speed could not be stopped under four hundred yards: *Held*, that the defendant's agents were not guilty of any neglect, and that the company was not responsible for the injury resulting from the engineer's running against a cow. *Proctor v. Railroad*, 579.

See "Common Carrier."

NEW TRIAL.

Whether a trial of facts is by a jury or by consent, if it appears that the finding was influenced by misdirection or misconstruction of the law, a new trial will be granted by this Court on appeal. In such case the former trial goes for nothing, and if it has by consent of parties been tried by the Court, the second trial must be by jury, unless there be a new agreement that the Court may try. *Benbow v. Robbins*, 422.

See "Appeal," 8; "Practice," 4, 13.

NON-RESIDENTS.

Before the Act of 21 January, 1870, Bat. Rev., ch. 41, sec. 2, non-residents had no right to make entries of, or take out grants for, the vacant land of the State. Since the passage of the

NON-RESIDENTS—*Continued.*

act, a resident of another State coming into this State, with the intention of becoming a *bona fide* resident, and entering vacant land, was of right entitled to receive a grant for the same: *Provided*, he moved and settled here within the time required to perfect his entries. *Mockridge v. Howerton*, 221.

NONSUIT.

See "Ejectment."

NORTH CAROLINA RAILROAD.

The North Carolina Railroad Company is invested by its charter with full authority to lease its road, with power to the lessee to change the gauge thereof. *State v. Railroad*, 634.

NOTICE.

See "Agent," 2; "Executors and Administrators," 7; "Mortgage," 2; "Practice," 7, 15.

OATH OF JURORS.

See "Murder," 5, 6.

OFFICERS.

See "Action," 4; "Fees"; "Mandamus," 1.

OFFICIAL BONDS.

See "Sheriffs," 1, 2, 3.

PAROL TESTIMONY.

See "Evidence," 2, 5, 6.

PARTIES.

See "Action," 5, 6, 7, 8.

PAYMENT.

1. (1) A debtor owing two or more debts to the same creditor and making a payment, may at the time direct the application thereof;
   (2) If he does not direct the application, the creditor may do so;
   (3) If neither at the time directs the application thereof, the law will apply it to that debt for which the creditor's security is most precarious. *Sprinkle v. Martin*, 92.

2. Payments in Confederate money are to be deducted at their nominal value from the sum owing; the value of the residue being ascertained upon the above principle. *Wimbish v. Miller*, 523.

3. The fact that a mortgage was given to secure the payment of the residue makes no difference in ascertaining the amount of the debt. *Ibid.*

See "Account," 1.

PETITION TO REHEAR.

See "Practice," 4.

PLEADING.

1. A plaintiff may in the same complaint join as separate causes of action, (1) the harboring and maintaining his wife; (2) the conversion of certain personal property, to which the plaintiff is entitled *jure mariti;* (3) inducing the wife, while harbored and maintained to execute to defendant a deed for land, under which he had received the rents; and (4) converting to defendant's own use certain mules, farming utensils, etc., set out in a marriage settlement executed by plaintiff and his wife. *Hamlin v. Tucker*, 502.

2. An answer, in an action for specific performance, or to correct an alleged mistake in a deed which avers that "the defendant has conveyed all the land he agreed to convey," raises an important issue, and is not "sham pleading." *Young v. Phifer*, 529.

POSSESSION.

See "Ejectment," 1; "Mortgage," 3.

PRACTICE—CIVIL CASES.

1. Where a plaintiff brought an action to review and correct a decree heretofore made in an old suit in equity, and not yet performed: *Held*, upon demurrer, that the proper remedy for the plaintiff was a motion in the original suit, still pending, and not by an independent action in the nature of a bill of review. *Long v. Cole*, 20.

2. Where, in an action to recover damages in the nature of waste the defendant, a tenant for life, dies pending such action, it is not error in the Court below to allow the personal representative of such defendant to be made a party. Further, the Court may, in its discretion, allow the plaintiff to amend his complaint, and declare for actual damages. *Shields v. Lawrence*, 43.

3. Where there are no facts found and the pleadings and affidavits are conflicting, the case will be remanded, to the end that the facts may be found by the Court below, or by a jury upon proper issues submitted to them. *Kitchen v. Troy*, 50.

4. In a petition by the defendants to rehear a case decided in this Court, for the purpose of having a new trial in the Court below, on account of newly discovered testimony, the affidavit set forth "that one Fennell was the bookkeeper for the defendants in their store; that said books show from the entries made by said Fennell that the plaintiff bought out of said store," etc., and "that said books were not allowed to be used in evidence, for the reason that said Fennell was not there to prove them," etc., and "that they had used every effort to find Fennell, but had failed"; and "that since the trial, they had discovered that he is now living in Chattanooga"; * * * "that the recovery is a hardship," etc., for that "said books which were offered in evidence were excluded," etc., and that "said books would show," etc.: *Held* to be insufficient to justify the setting aside a former judgment of this Court and granting a new trial. *Shehan v. Malone*, 59.

PRACTICE—CIVIL CASES—*Continued.*

5. In such an affidavit it is not sufficient for the affiants to state that they had used *every* means to find out where the witness was, etc.; they ought to have stated what means they did use, and let the Court judge. *Ibid.*

6. In an appeal by a defendant to the Superior Court, from a judgment of a justice of the peace, it lies within the discretion of the presiding Judge to require the plaintiff to give security for the further prosecution of the suit, or not. *Smith v. Railroad*, 62.

7. It is error for a Judge in the Superior Court to set aside a judgment on the motion of the defendant, without giving the plaintiff the legal notice. *Sutton v. McMillan*, 102.

8. In an appeal to this Court by the defendant, who makes up a statement of the case and submits it to the plaintiff, who neither objects to the defendant's statement nor gives notice that on account of a disagreement as to such statement the presiding Judge will settle the same, the statement so made up by defendant will be considered in this Court as the record proper. *Isler v. Haddock*, 119.

9. If in such case the Judge who presided at the trial below has gone out of office, and the papers are lost, the only remedy is a new trial. *Ibid.*

10. Where a defendant appealed to this Court, and made out a statement of the case, to which the plaintiff did not agree; and the presiding Judge being notified of the disagreement, appointed a day to settle the case, of which the parties had notice; but before he did settle the case, his term of office expired, and no case was sent up: *Held*, the only remedy for the defendant is a new trial. *Mason v. Osgood*, 120.

11. A decree in a court of equity regularly enrolled and registered is final and cannot be impeached by a motion in the cause. *Thaxton v. Williamson*, 125.

12. Before the adoption of The Code such a decree could only have been impeached by a bill of review, and since its adoption can only be impeached by a civil action commenced by summons. *Ibid.*

13. Where the plaintiff and defendant swear to a contradictory state of facts, and the jury find the issues in favor of the plaintiff, the questions of law arising from the statement of the defendant will not be considered upon an appeal to this Court. *Regan v. Regan*, 196.

14. Where an order for a new trial was granted in favor of a defendant, and at the ensuing term was set aside at the instance of the plaintiff, the defendant had a right under sec. 133 of the Code of Civil Procedure to move to set aside the original judgment; and if, in his discretion, the facts justified it, the presiding Judge committed no error in granting the same. *Cowield v. Warren*, 223.

PRACTICE—CIVIL CASES—*Continued.*

15. A Judge below, in stating a case for this Court, which has been the subject of a reference, should not find facts and make decisions of law not raised by the referee's report. *Bason v. Harden*, 287.

16. It is error to set aside a judgment obtained at a regular term of the Court upon motion without notice to the adverse party. *Lyon v. McMillan*, 392.

17. Upon a motion to be allowed to defend after judgment, under sec. 85, ch. 17, Bat. Rev., the facts in the case must be found by the Court in which the motion is made. *Utley v. Peters*, 525.

18. Where a summons was issued within ten days before the term of the Superior Court to which it was returnable: *Held*, that the action should have been dismissed on the motion of the defendant, and that it was error to order an *alias* returnable to the next ensuing term. *Folk v. Howard*, 527.

See "Appeal," 1, 3, 6, 8; "Attachment," 3; "Complaint," 1, 2, 3; "Demurrer," 1, 2; "Deposition," 1; "Homestead," 12; "Injunction," 2, 3, 4.

PRACTICE—CRIMINAL CASES.

A temporary separation of a juror from his fellows under the supervision of the Court, that said juror may be examined as a witness in a case then pending, will not of itself vitiate the verdict returned after the juror returns to the jury-room. *State v. Durham*, 447.

PRESUMPTIONS.

See "Burglary," 1, 2.

PRIVATE EXAMINATION.

See "Deeds," 3.

PROBATE OF DEEDS.

See "Probate Courts."

PROBATE JUDGE.

See "Executors and Administrators," 4.

PROBATE COURTS.

1. The provision of the law which requires the certificate of probate made by the Probate Judge of a county other than that in which the instrument is to be registered, to be passed on by the Probate Judge of the latter, is only directory, and a registration, upon a probate, which has not been passed upon, is valid. *Holmes v. Marshall*, 37.

2. The cases required by sec. 420 of the C. C. P. to be submitted by the Judge of Probate to the Judge of the Court in or out of term, are those only where the petitioners are infants and the proceedings *ex-parte*. *Stafford v. Harris*, 198.

PROBATE COURTS—*Continued.*

3. Where an administrator petitions to sell a certain tract of land for the payment of debts, which land is particularly identified and described by metes and bounds in the petition and the order of sale, the order confirming the sale and the order to make title; and before the title is made to the purchaser of the land the administrator dies: *Held*, that the Probate Court had no authority, after such order and confirmation of sale and order to make title, to entertain a motion in the cause, on the part of the purchaser, to so amend the pleadings as to include another tract of land not therein mentioned. *Ibid.*

4. *Held further*, that under the circumstances, even if the case was properly before the Court, his Honor would have no power to amend the petition, upon parol evidence that a tract of land had been omitted therefrom through mistake. *Ibid.*

5. It is the plain duty of a Probate Judge to refuse to confirm a sale of land by an administrator under a decree of his Court, when it appears that the land was bid off at such sale for the benefit of the administrator. *Shearin v. Hunter*, 493.

6. A Judge of Probate has no power to make to himself an allowance "for his services in stating an account"; nor has he the power to make an allowance to the attorneys of the creditors for services in their behalf. *Patterson v. Miller*, 516.

7. A Probate Judge who is personally interested in the commissions to be allowed to executors is excluded from jurisdiction in such cases. And there can be no waiver of the disqualification, unless by parties having an opposing interest in some action, in which the allowance of commissions arises before him. *Barlow v. Norfleet*, 535.

8. The Probate Court has exclusive original jurisdiction of special proceedings to recover legacies and distributive shares. *Hodge v. Hodge*, 616.

9. This rule is subject to the exception, that when the assent of the executor amounts to an express or implied promise to pay a legacy or distributive share, it becomes a debt, recoverable like any other debt, in the Superior Court. *Ibid.*

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

In proceedings supplementary to execution, if the judgment debtor dies before the appointment of a receiver, or before the order of such appointment is filed in the office of the Clerk of the Superior Court, the property and effects of such judgment debtor do not vest in the receiver, nor has the judgment creditor any lien thereon as against the administrator of the judgment debtor. *Rankin v. Minor*, 424.

PUBLIC ADMINISTRATOR.

See "Executors and Administrators," 4.

PUBLIC DEBT.

The Act of 23 November, 1874, repealing the Act of 19 August, 1868, providing for the payment of the public debt, does not impair the obligation of contracts; and under its provisions the Public Treasurer was justified in refusing to pay the coupons of bonds issued before the war, although payment thereof had been demanded and action brought, which was pending when the said act passed. *Wilson v. Jenkins*, 5.

See "Mandamus," 1.

PUBLIC TREASURER.

See "Mandamus," 1, 2, 3.

RAILROADS.

1. The right to value the tangible real and personal property of a railroad corporation, as distinguished from its franchise, is vested by the Constitution in the Township Boards of Trustees. *Railroad v. Commissioners*, 10.

2. The payment of a tax upon the franchise of a corporation, valued improperly and upon erroneous principles, is no defense against a tax legally levied by the county authorities under the general law. *Ibid.*

3. Such franchise is capable of valuation, apart from the property which the corporation may happen to own; and a valuation of the franchise does not necessarily or properly include a valuation of the corporate property. *Ibid.*

See "Taxes and Taxation," 1; "Appeal," 4.

RECEIVER.

See "Proceedings Supplemental to Execution."

RECORD.

If a record shows one to be plaintiff, when in fact he was not, it stands as where the record shows one to be defendant, when he was not. In both cases the record is conclusive, until corrected by a direct proceeding for that purpose. *Doyle v. Brown*, 393.

See "Amendment," 1.

RECORDARI.

See "Justices of the Peace," 8.

REGISTRATION.

See "Probate Courts," 1.

REFERENCE.

See "Practice," 14.

REHEARING.

See "Supreme Court," 1.

REMOVAL OF CASES.

1. Where in an affidavit filed for the removal of a prisoner's case, the facts whereon the belief is founded are set forth, so that, in the language of the statute, "the Judge may decide upon such facts whether the belief is well founded," the Judge acquires complete and final jurisdiction, his decision not being the subject of review by this Court. *State v. Hill*, 345.

2. Sec. 115 of ch. 31, Rev. Code, relating to the removal of causes, not being digested nor brought forward, is not repealed by sec. 2, ch. 121, Bat. Rev.; and the Superior Courts have the same authority to remove criminal causes to adjacent counties as they had before the compilation of that Revisal. *State v. Cunningham*, 469.

REMOVING CROPS, ETC.

See "Indictment," 6, 7.

REPLEVY BOND.

See "Attachment."

RESTITUTION—WRIT OF.

A defendant, whose land has been sold by the Sheriff under an execution issuing without proper authority, and who has been dispossessed by the purchaser at the Sheriff's sale, under summary proceedings before a justice, has a right to have a writ of restitution, and to be put into the possession of his land so sold. *Heath v. Bishop*, 456.

RIOT.

See "Indictment," 1.

SALE OF LAND.

See "Restitution"; "Execution Sale," 3, 5.

SALE OF LANDS FOR ASSETS.

1. In a petition to sell land for assets, an order that B, the executor, and H, the executrix, "have leave to sell seventy-five acres of the land described in the petition, so as not to include the dwelling-house and outbuildings and garden of the premises, to be surveyed and set apart by the petitioners before sale," and there was no survey made to identify the seventy-five acres: *Held*, that such order was too indefinite to justify a sale, and should be vacated and the sale set aside. *Blythe v. Hoots*, 575.

2. Where an order of sale directs it to be made by the executor and executrix, and the sale is made by the executor alone, who received all the purchase money and made his report of sale, which was confirmed: *Held*, that such sale was irregular, subversive of the rights of the executrix, and ought to be set aside. *Ibid.*

See "Dower," 1; "Homestead," 13; "Probate Courts," 3, 4, 5.

SALE OF LAND FOR PARTITION.

One who was not a party to a former petition in equity for a sale for partition, is in no way affected by any decree or proceeding in it: *Therefore*, such party cannot bring an action by way of bill of review, to modify or vacate the decree made in such original action. *Henderson v. Wallace*, 451.

SALE OF SPIRITUOUS LIQUORS.

See "Indictment," 5.

SECURITY FOR COSTS.

See "Appeal," 1; "Practice," 6.

SET-OFF AND COUNTER-CLAIM.

An action brought by the original obligees of a note, to the use of a *feme* plaintiff and her husband, is subject to be set off by an account for medical services rendered the *feme* plaintiff before her marriage. *Gray v. Johnson*, 68.

SHERIFFS.

1. Where A was elected Sheriff of B County in August, 1874, and tendered to the Board of County Commissioners of said county a bond in the sum of $10,000, conditioned for the faithful execution of process, etc., which bond was accepted by said board, and then tendered two bonds of $10,000 each, justified in the amount of $13,000 each, one for the collection of the county taxes, etc., and the other for the collection of the State taxes, etc., which last two bonds were refused by the board, who also refused to qualify him as Sheriff, but appointed another person: *Held*, that A was entitled to a *mandamus* to compel the County Commissioners to receive his bond and qualify him as Sheriff of said county. *Sikes v. Commissioners*, 34.

2. Ch. 106 of Battle's Revisal differs materially from ch. 105 of the Rev. Code; and as it does not appear that that chapter in Battle's Revisal was ever regularly enacted by the General Assembly according to the provisions of the Constitution, ch. 105, sec. 13, Rev. Code, is still law. *Ibid.*

3. A sheriff and his sureties are liable on his official bond only for a breach of some duty specifically described therein. *Eaton v. Kelly*, 110.

4. A sheriff is not entitled to any extra compensation for executing a "writ of ejectment," or a "writ of possession." Sec. 21, ch. 105, subdiv. 14, Bat. Rev., does not apply to such cases. *Allen v. Spoon*, 369.

5. By a levy, the property is vested in the Sheriff, and his title is transferred to the purchaser, whether the sale is public or private. If there is any surplus after satisfying the execution debtor, it belongs to the execution debtor or his proper legal representative. *Love v. Johnston*, 415.

6. An action by a sheriff against one of his deputies for failing to take bail upon a *capias ad respondendum*, whereby the Sheriff had to pay $175 as special bail, is founded upon an

SHERIFFS—*Continued.*

implied contract, of which the Superior Court had no jurisdiction, the amount demanded being under $200. *Latham v. Rollins*, 454.

7. Where a sheriff, having in his hands an execution against A, and another against B, sold property found by the jury to belong to A (who was present and forbade the sale), under the execution against B, saying nothing at the sale of the execution against A: *Held*, that the Sheriff was responsible to A for the value of the property so sold. *Davis v. Calloway*, 476.

See "Execution Sale," 1; "Homestead," 4, 10; "Infant," 1; "Murder," 4; "Restitution."

SPECIAL PROCEEDING.

1. A special proceeding, under sec. 73, ch. 45, Battle's Revisal, differs from a creditor's bill, in that in the latter all the creditors *may* make themselves parties, while in the former they *are required* to do so. *Patterson v. Miller*, 516.

2. The cost in such proceedings must abide by the provisions of ch. 105, Battle's Revisal. *Ibid.*

SPECIFIC PERFORMANCE.

1. If A buys the property of B, but in his own name, A has the legal title, holding it in trust for B; and under our former system equity would compel a conveyance from A, upon B's doing what was required of him. *Faucett v. Bryan*, 512.

2. Where a defendant, upon the request of the plaintiff, bought in his own name the property of the plaintiff at a sale by the United States Marshal, under an agreement that the plaintiff should have the property upon a subsequent settlement: *Held*, that the defendant was no agent of the plaintiff, but held the property in his own name until it was divested by plaintiff's performing his part of the agreement. *Ibid.*

STATE FINANCES.

See "Mandamus," 1, 2, 3.

STATEMENT OF CASES.

See "Practice," 8, 9, 10, 14.

STATUTE OF LIMITATIONS.

1. The new promise, necessary to repel the bar of the statute of limitations, must be definite, and show the nature and amount of the debt; or must distinctly refer to some writing, or to some other means, by which the nature and amount of the debt can be ascertained. Or there must be an acknowledgment of a present subsisting debt, equally definite and certain, from which a promise to pay such debt may be implied. *Faison v. Bowden*, 405.

2. The Act of 1866-'67, ch. 18, sec. 1, relates only to debts and causes of action arising out of new matter, and transactions subsequent to 7 May, 1865, and was not intended to embrace old debts or transactions occurring before that date, out of

STATUTE OF LIMITATIONS—*Continued.*

which causes of action might arise after that date. Therefore, where in an action on a guardian bond the plaintiff, a *feme covert*, became of full age in 1866, married in 1869, and instituted the action in 1874: *Held*, that the statute of limitations did not bar the right of action. *Lippard v. Troutman*, 551.

3. The provision of the C. C. P. allowing a *feme covert* to sue or be sued concerning her separate property does not remove the disability of coverture so as to allow the statute of limitations to bar a *feme covert's* right of action. *Ibid.*

STOCKHOLDERS.

See "Action," 6, 7, 8.

SUMMARY PROCEEDINGS.

See "Landlord and Tenant," 1.

SUMMONS.

See "Complaint," 1, 2, 3; "Homestead," 12; "Infants," 1, 2; "Justices of the Peace," 7; "Judgment," 1, 4; "Practice," 12, 17.

SURETY AND PRINCIPAL.

One who signs a covenant as surety upon the condition and agreement between him and his principal, that it is not to be binding upon him, or delivered to the covenantee, unless another person should also sign it as surety, is bound thereby, although the principal to whom he entrusted it delivered it to the covenantee, without a compliance with such condition, of which and its breach the latter has had no notice. *Gwyn v. Patterson*, 189.

See "Advancements," 1; "Appeal," 1; "County Commissioners; "Guardian and Ward," 1, 2.

SUPERIOR COURTS.

1. The Superior Courts have exclusive original jurisdiction of misdemeanors arising under sec. 19, ch. 115, Laws of 1873-'74, failing to give in his poll for taxation. *State v. Upchurch*, 146.

2. The Superior Court has power to strike out an answer whenever it appears to the satisfaction of the Court that it is irrelevant or frivolous, under either sec. 169 or sec. 120, C. C. P. *Commissioners v. Piercy*, 181.

3. The Superior Courts have concurrent jurisdiction with justices of the peace of the offense of entering on land after being forbidden so to enter. If complaint is not made by some person within six months from the commission of the offense, a justice has no jurisdiction, and its cognizance is left to the Superior Court. *State v. Presly*, 204.

4. The judgment of the Superior Court, upon the facts relied upon to sustain a motion under sec. 133, C. C. P., to set aside a judgment, as to the truth of such facts, is final. The judgment, as to their sufficiency in law, is subject to review. *Johnson v. Duckworth*, 244.

SUPERIOR COURTS—*Continued.*

5. A Superior Court has no power, under sec. 1, ch. 22, Bat. Rev., to order a defendant to pay into Court on a day certain, the amount of a *debt* due on a judgment, and in default thereof to attach such defendant for contempt of Court. *Daniel v. Owen*, 340.

6. The courts still have power, where the relation of trustee and *cestui que trust* exists, to order a fund held in trust to be paid into Court, *to the end* that the fund should be put under the protection of the Court. Such an order is a lawful order within the meaning of the statute, and may be enforced by attachment for contempt. *Ibid.*

7. The Superior Court did not acquire original jurisdiction of actions to recover legacies by the passage of the Act of 1872-'73, entitled "An act to cure defects in certain judicial proceedings arising from mistakes of jurisdiction and other causes." *Hodge v. Hodge*, 616.

See "Bastardy," 1; "Practice," 14, 16; "Removal of Causes," 2.

SUPREME COURT.

1. The weightiest considerations make it the duty of the courts to adhere to their decisions. No case ought to be reversed upon a petition to rehear, unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the Court. *Watson v. Dodd*, 240.

2. Where, upon appeal, an imperfect account was brought up to this Court, and the judgment of the Court below modified: *It was held*, that this Court had authority to refer such account to its clerk, to be reformed so as to correspond with its judgment in such appeal. *Whitford v. Foy*, 247.

See "Appeal," 7; "Practice," 13.

TAKING PRIVATE PROPERTY FOR PUBLIC USE.

The order of a superior military officer, of itself, will not justify his subordinate in taking private property for public use. When, with such order, there is an immediate military necessity for such taking, the subordinate will be justified. *Koonce v. Davis*, 218.

TAXES AND TAXATION.

1. The payment of the tax upon the franchise of a railroad corporation, under the Act of 1872-'73, ch. 115, does not exempt the corporation from the payment of county and State taxes, properly levied upon its road-bed, superstructure, etc. *Bridge Co. v. Commissioners*, 15.

2. In order to pay debts contracted prior to the adoption of the Constitution, taxes may be levied by the County Commissioners, without regard to the constitutional limitation or equation; but in regard to new debts, both must be observed. *Trull v. Commissioners*, 2, 3.

See "Municipal Corporations," 2, 3; "Railroads," 2; "Superior Courts," 1.

TENANTS IN COMMON.

See "Wills," 6.

TENDER.

A tender of Confederate money in 1863, at its nominal value, in payment of a note due in 1857, is not a legal tender *for any purpose*. *Love v. Johnston*, 315.

TITLE.

See "Execution Sale," 1; "Judgment," 3; "Probate Courts," 3.

TOWNSHIP TRUSTEES.

See "Municipal Corporations," 3; "Railroads," 1.

TRIAL BY JURY.

Parties are entitled to a jury trial in all cases when they have not waived their right to demand it, *as they have in a reference by consent*. *S. c.*, 70 N. C., 34. *Lippard v. Roseman*, 427.

TRUSTEES OF THE UNIVERSITY.

See "Constitution," 1, 2.

TRUSTS AND TRUSTEES.

1. Where A, in 1863, conveyed his property to B, *in trust* to pay certain enumerated debts, divided in the deed into three classes, and C, one of the second-class creditors, directed the trustee, B, to withhold from collection an amount sufficient to pay his debt, which was done, and the note so withheld by the trustee became worthless by the results of the war, and not through any default of the trustee: *Held*, that C was not entitled to a *pro rata* share of the money collected for the benefit of the second-class creditors, and that the trustee was not liable therefor. *Bason v. Harden*, 287.

2. A trustee, who diligently inquires after the holder of a certain note secured to be paid in the second class of a trust made in 1863, and who being unable to find the same, still reserves a sufficient amount of the trust funds, to-wit, a note solvent at the time, to pay said secured note, is not guilty of laches because of said trust fund note becoming worthless from the result of the war; and being in no default, cannot be charged with its *pro rata* payment as a second-class debt. *Ibid.*

See "Estoppel"; "Specific Performance"; "Superior Courts," 6.

UNLAWFUL ASSEMBLY.

See "Indictment," 1.

UNLAWFUL FENCE.

See "Justices of the Peace," 2, 3.

VACANCY.

See "Judges of the Superior Court," 1, 3.

VENDOR, ETC.
See "Execution Sale," 5.

VENUE.
See "Infant," 4.

VERDICT.
See "Larceny," 1, 3; "Practice—Criminal Cases."

WAIVER.
See "Contract," 4; "Probate Courts," 7; "Trial by Jury."

WARRANTY.
See "Homestead."

WASTE.
See "Practice," 1, 2.

WIDOW.
See "Homestead," 1, 2; "Wills," 1.

WILLS.

1. A testator, after leaving certain personal property to his widow, devises to her his lands in the following words: "Also my land and stock of all kind, that I am in possession of; also all my other property," etc. "I also empower my wife to give to my daughter E. and to W. (his son) any of said property herein mentioned at any time, or from time to time, as said wife may think proper": *Held*, that the widow had only a life estate in the land, and that she had no power to convey the same by deed or otherwise to any person whatsoever, except her children named. *Russ v. Jones*, 52.

2. A testator devised to his widow, for life, certain lands, and directed the same to be sold after her death and the proceeds divided, with certain limitations, among his children, to one of whom, Thomas, he had given a tract of land for life, with limitation to his wife, etc.: *Held*, that Thomas took only a life estate in the proceeds of the sale of his father's land, and that the land devised to him for life, etc., is to be sold to repay such proceeds to the parties entitled. *Cobb v. Henderson*, 374.

3. A testator in his will leaves to E. T. C. "all the residue of my estate, both real and personal, during her natural life or single state": *Held*, that E. T. C. was entitled to the use and enjoyment of the specific property so given, and that the executor had no right to intermeddle therewith, except to prevent a loss or unnecessary waste of the same. *Chambers v. Bumpass*, 429.

4. Where devises of land are vague and indefinite, it is competent for the Court, by the intervention of commissioners, to render that certain which was before uncertain, and thus effectuate the intention of the testator. And there being no suggestion of fraud or misconduct on the part of such com-

WILLS—*Continued.*

missioners, and no evidence offered to sustain the exceptions to their report, the report should be confirmed. *Harvey v. Harvey*, 570.

5. Where a testator devised to A and B, two of his sons, each a portion of his land, and in another clause directed the residue to be sold, and the proceeds to be divided between others of his children: *Held*, that A and B may be regarded as tenants in common with those claiming the residue; and that the Court may call to its aid commissioners to make partition of the lands of the testator. *Ibid.*

WITNESSES.

1. It is error in the Judge on a trial of a cause in the Court below to submit the competency of a witness as a question of fact for the jury. The competency of a witness is a question for the Court, to be raised when he offers to testify, and to be determined by the Court. *McLean v. Elliott.*

2. If a witness to a will is interested as a legatee thereunder, he is a competent witness to prove the will, the effect being to deprive him of the legacy. Bat. Rev., ch. 119, sec. 10. *Ibid.*

3. A proposed witness, whose interest in the event of the suit is such as substantially makes him a plaintiff, is incompetent to testify as to a conversation between a testator, from whom he derives his interest, and the intestate of the defendants. *Barlow v. Norfleet*, 535.

See "Practice," 4, 5.

WOUNDING CATTLE.

See "Indictment," 3, 4.

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